The Central Law Journal.

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A QUESTION, of particular interest to bondholders, was lately passed upon by Judge Wallace, of the United States court at New York, in the case of Wylie v. Missouri Pacific Railroad. The suit was brought to recover the value of certain bonds of the Pacific Railroad, which were stolen from the Northampton bank in Massachusets in 1876. The numbers of the bonds were changed, and they were sold to innocent purchasers. The plaintiff, after the bonds matured, sued the Missouri Pacific, which had in the meantime become liable for the obligations of the other company, to recover the value of the bonds, claiming that they were destroyed. The company resisted, contending that the bonds were still outstanding, and that the plaintiff should bring suit against the holders to determine the question of ownership. Judge Wallace said that the only question in the case was whether an alteration of the serial number of a negotiable bond was a material alteration. If it were, it destroyed obligation in the hands of an innocent purchaser; if not, the purchaser secured a valid title as against the plaintiff, and the latter could not have a cause of action against the company. He decided in favor of the company, holding that an alteration of the number is not, in the case of ordinary bonds, a material one. Ordinarily, he said, the number upon a note, check or bond is only intended to serve the convenience of the maker or owner in distinguishing it from others of a similar tenor. It does not directly or indirectly enter into the tenor of the contract, and is not, therefore, material.

IT is learned from Washington advices that the Judiciary Committee of the House of Representatives has completed its consideration of proposed bankruptcy legislation, and has agreed to report a bill to the house. The bill to be reported is substantially the Torrey bill, which was supported so generally by commercial organizations throughout the country. This measure has been amended in some particulars, which, however, are said not to be important. There appears to be some division in the committee upon the subject of bankruptcy legislation, and as a result there will be a minority report, and the majority will only report the bill for consideration without very strongly urging its passage at this time. The advocates of a national bankruptcy law should not forget that they have still some hard work before them.

It is to be hoped that the agitation of the question of consolidation of the Supreme Court of Illinois at one place, by the recent meeting of the bar association of that State will bear fruit at the next meeting of the legislature. But the subject has so often for the past twenty years been brought before them without any definite action being taken, that the friends of the movement will have to stir themselves to accomplish it. There is no question that, as stated by many of the speakers at the meeting, an impression prevails that cases do not have the deliberate consideration of all the members of the court, which they would have if the court was held at the place where the judges reside. Whether this is true or not, it is certain, at least, that the practice before and the decisions of the court would be more satisfactory to the profession if the court were held in one place. As it is now, much time is lost and many opportunities for counsel among themselves are thrown away by compelling the judges to travel about like so many Methodist ministers.

WE have so far made no mention in our columns of the appearance of Mr. Lawson's latest work "Rights and Remedies" for the reason that we desired to give it a careful examination and study with a view to an intelligent and useful review, one commensurate with the great ability of the author and the scope of the work. As is well known to our readers, Mr. Lawson was for many years the editor of this journal, and as such manifested a high order of talent, which his later treatises have served to confirm. For a few years past he has been in hiding, so to speak, diligently at work preparing the material for this the crowning master piece of his life,

It may be news to some that Mr. Lawson is yet a young man and the reception which has been accorded his "Rights and Remedies" and the very thorough character of the labor apparent within it, attest his right to be ranked among the older expounders of the law.

NOTES OF RECENT DECISIONS.

In many of the cities serious and perplexing questions are arising concerning the use of electricity in connection with electric lighting and electric railway propulsion, the systems used for those purposes, in many cases, doing great injury to the business of telephone communication, and inducing currents of electricity which very much impairs the use and service of the telephone. On this subject a recent decision of Judge Taft, of the Superior Court of Cincinnati, in the case of the City and Surburban Telegraph Association v. The Cincinnati Inclined Plane Railway Company,[1] will be read with interest, as being a clear exposition of the law governing the question as to the right of a telephone company to enjoin an electric railway company from so operating its road as to impair the use of telephones and cause damage to the telephone company. The court first considers the question as to the legality of the franchises owned by plaintiff and defendant, and concludes that each is lawfully entitled to enjoy its appropriate franchise. The court then states the substance of the question at issue in saying: "It becomes necessary to inquire first, whether any loss has been inflicted upon plaintiff by defendant, and if so, how it has occurred; second, whether such loss, if any, is justified by defendant's franchise, so as to be *damnum absque injuria*, which involves the preliminary question whether the legislature, after having given the plaintiff the right to construct its telephone system, on the faith of which right it has expended large amounts, can confer a franchise on another, the exercise of which will seriously impair the plaintiff's franchise as heretofore enjoyed." After discussing at length the evidence of interference and of actual damage to plaintiff's business, the court says:

Is it a loss for which defendant is liable? The contention on behalf of the defendant is, that because it has full power to operate by electricity under the law, the loss resulting to the plaintiff is *damnum absque injuria*, and if the plaintiff wishes to avoid the loss, it must adopt safeguards in the shape of a metallic circuit to avoid the difficulty. To this plaintiff replies, that, by virtue of its grants, it acquired, before the defendant had a right to use electricity as a motive power, a vested interest in the telephone system as it now operates it, with a grounded circuit, and that not even the legislature of the State could take away from it or injure this franchise, on the faith of which it has expended so much capital and labor.

I am inclined to think that, under the constitutional provision that all laws for the forming of corporations may be altered or repealed (§ 2, Art. XIII), it would be in the power of the legislature to grant a right to other corporations for a public use to so use the street as to require the plaintiff company, if it wished to continue in the telephone business, to change its system, and that without any right of action against such corporations. The case of Ry. Co. v. Ry. Co., 30 Ohio St. 604, shows that, where one railway company condemned a right of way across the track of another, that another cannot recover for an injury to its franchise as a railroad, or for the increased expense entailed upon it in obeying laws of the State with reference to railroad crossings. However this may be, I am very clear that no intention on the part of the legislature to abridge the granted rights of one corporation by a new grant to another will be recognized by the courts unless such intention plainly appears in the law. In England, the power of parliament is unlimited, and it may even confiscate private property, and a *fortiori* may abridge and destroy chartered rights and franchises. Nevertheless, we find in that country, that where one corporation is granted a right which may be so exercised as to injure or interfere with a right previously granted to another, the presumption of law is that parliament intended only such uses as was consistent with the rights of the first corporation. In Gas Light and Coke Co. v. Vestry, 15 Q. B. D. 1, plaintiff was a gas company which had laid its gas pipes by virtue of a public grant under a street which the defendant a public corporation, was charged with keeping in repair, and upon which it used such heavy rollers as to injure the pipes of the plaintiff. The rollers used were economical and well fitted for the purpose, but it was held that, unless the defendants were expressly authorized by statute to use rollers of the size and weight of those which did the injury, the defendant could not justify under a duty to keep in repair which might be discharged with rollers of less weight and without breaking the pipes. Says Lindley, L. J.: "The authorities * * * show that an action lies for injury to property unless such injury is expressly authorized by statute, or is, physically speaking, the necessary consequence of what is authorized. If in this case the defendants were expressly authorized by statute to use steam rollers of such a weight as necessarily to injure the plaintiffs' pipes, the plaintiffs would have no ground of complaint. The case would then be one of *damnum absque injuria*. The same consequence would follow if the defendants were expressly authorized by statute to repair in some way which necessarily required the use of heavy steam rollers or other machinery, which could not be

[1] For a copy of this opinion we are indebted to G. H. Wald, Esq., of the Cincinnati bar, who was one of the attorneys for the plaintiff.—[ED.

worked without injuring the plaintiff's pipes. There again, although such rollers or machinery were not expressly mentioned, there use would be authorized by necessary implication, and the plaintiffs would be without redress. But unless some statutory enactment can be shown to authorize the defendants to injure the plaintiffs' pipes, the plaintiffs are entitled to redress." This case is peculiarly applicable to the case at bar, because here was a case of a public grant to the gas company enjoyed in a certain way, followed by a grant to the defendant to exercise another right, which if exercised in one way would injure plaintiff's enjoyment of its right, and which if exercised in another would not. The same principle is here applied that courts recognize wherever private property is injured by the exercise of authority granted by the parliament. See Hammersmith, etc. Ry. Co. v. Brand, L. R. 4 H.L. 171; Queen v. Bradford Navigation Co., 6 B. & S. 631; Geddis v. Proprietors of Bann Reservoir, 3 App. Cases, 430; Att'y Gen'l v. Colney Hatch Lunatic Asylum, L. R. 4 Ch. App. 416; Att,y Gen'l v. Gas Light & Coke Co., 7 Ch. D. 217; Managers Metrop. Asylum District v. Hill, 6 App. Cases, 193.

Even then, if franchises to occupy the public streets conferred by the legislature may be subject to modifications of their use and enjoyment by other public grants of the legislature, it is certain that unless the legislative intent to make such modification clearly appears, either by express words or by necessary implication arising from the impossibility of enjoying the second grant without such modification, it will not be inferred.

But it is said that this principal can have no place here because the right to occupy the street for the purpose of travel is a superior right to that of using it for telephone poles. Defendant's counsel, to establish this, rely on the Spring Grove Ave. v. Cumminsville, 14 Ohio St.; Smith v. Tel. Co., 2 C. C. R. 259; Mt. Adams & E. P. R. Co. v. Winslow, 3 C. C. R. 425; R. R. Co. v. Williams, 35 Ohio St. 171; Pike's Ex'rs v. Western U. Tel. Co., decided by this court.

These cases have no bearing upon this case at all, as it seems to me. They involved a discussion of whether the erection of certain structures in the street could be considered a new burden and use, not included in the easement, which the abutting property holder had originally granted to the public, and whether therefore he was entitled to compensation. It is unquestionably within the power of the legislature, so far as the public is concerned, to enlarge the benefit to be derived from the streets, so as to include other public purposes than those of mere travel. Ry. Co. v. Lawrence, 38 Ohio St. 45. If this takes more from the abutting property holder than he originally gave, then he may have compensation, but the public cannot complain, for their representative, the legislature, has spoken and granted the use. When the telephone company is granted the right to use the streets, its right is as well founded as that of a street railway company and in the absence of express legislative direction to the contrary, there is to be no yielding to any other. The provision that the telephone and telegraph lines shall not incommode the public in the use of the street, in section 3461, does not help the defendant. The inconvenience must be determined when the enjoyment of the franchise is entered upon. After rights have been acquired by the outlay of capital and user, there must be express legislative sanction, at least, to warrant a court in finding a use of the street to be an interference with public travel, which was not so when it began. It should be noted in this connection, too, that the plaintiff performs a very important *quasi* public duty, and is in fact a common carrier of messages. It is given the power of condemnation on that ground alone. Pierce v. Drew, 136 Mass. 75; Hockett v. State, 105 Ind. 250.

Coming now to apply the principle just under discussion to the case at bar, what do we find? For ten years, the plaintiff has exercised the franchise of occupying the streets along defendant's lines with its poles and wires conducting a telephone business with a single wire circuit and an earth return. This mode of return was universally employed when it began, and is to-day in general use. It has constructed a valuable plant, many parts of which will have to be changed at great expense if it is to adopt the only system which will obviate the difficulty it now encounters from the operation of defendant's railway. * * * It is impossible, then, for the defendant to run an electric railway along its streets without making these disturbances? It is practically conceded, although there was some slight evidence to the contrary that if instead of a single trolley wire, and an earth return, two trolley wires were used, one for the positive and the other the negative current, the difficulties would be just as completely obviated as if the telephone company used a metallic circuit. There is such a system in use in a number of cities of the country. There are two in operation in this city, and two or three more are projected here. In such a system the electricity is carried from one wire down through one trolley wheel and mast to the motor of the moving car, and returns from the motor to the other wire by means of a second trolley wheel and mast. * * * On the whole, then, it seems to me that there is no serious obstacle to defendant's using the double trolley. A change will no doubt involve the defendant in substantial expenditures in the overhead structure, which will have to be made heavier. But nearly all of the material can be used again, and no material changes need be made either in the dynamos, engines, or motors.

But it is said that the injuries here occasioned are not cognizable in the courts, even if the telephone company is to be regarded as a private property owner in the enjoyment of the telephone franchise, and the case of Frazier v. Siebern, 16 Ohio St. 614, is relied on in this connection. That was a case between adjoining proprietors, where the defendant dug a well on his premises and knowingly diverted percolating waters which made a spring on the plaintiff's premises, and dried the spring. This was held to be *damnum absque injuria*. There is no parallel between that case and the one before us. There the spring owner had no ownership in the percolating waters until they appeared on his property, and the injury he suffered arose simply from his neighbor making his own that to which, while it was on his premises, he lawfully entitled. In the case at bar, the disturbances, in their two-fold origin, present slightly different circumstances, but call for the application of the same principle. The earth leakage arises from the defendant's pouring electricity into the earth, which, following a course as natural for it as the seeking of a lower level is for water, comes upon the premises of plaintiff's subscribers, and by getting upon the wires of the telephone, does harm. The plaintiff, by contract with its subscribers, has a right to have its wire it is, and, for the purposes of this discussion, has exactly the same right to object to the presence of electricity on his premises caused by defendant and resulting in damage, as would the subscriber himself. It is impossible

to distinguish such an injury in principle from the case of one discharging filthy water into the ground so that it shall percolate into another's premises and there do damage, or of one's causing smoke and cinders to be constantly thrown into one's windows and injuring one's enjoyment of one's property. These are all examples of nuisaaces which have been held to give a right of redress. Ballard v. Tomlinson, 29 Ch. D. 115; Ry. Co. v. Gardiner, 45 Ohio St. 309. In Reinhardt v. Mentasti, 42 Ch. D. 685, it was held to be a nuisance for the defendant, a pastry cook, to put in a room in his house which adjoined a room of the plaintiff long used as a wine cellar, a stove so large that, when it was being used it heated the wine cellar, and made it useless for that purpose.

In Attorney-General v. Gas Co., 7 Ch. D. 217, the creation of noisome gases was held a nuisance. How can injury from electricity be distinguished from an injury by water, gas smoke, or heat. The term nuisance signifies any thing causes hurt, inconvenience, annoyance, or damages. Columbus Gas Co. v. Freeland, 12 Ohio St. 392. As was said in Reinhardt v. Mentasti, 42 Ch. D. 685, "the principle governing the the jurisdiction of the court in cases of nuisance does not depend on the question whether the defendant is using his own, reasonably or otherwise. The question is, does he injure his neighbors?" The disturbance by induction is of similar character, except that the force is applied from one wire to the other though the air instead of the earth. If, as we have found, defendant is not entitled to interfere with plaintiff's enjoyment of the telephone franchise here is a direct act of interference. I presume that if a man arranges a set of mirrors, with reference to the sun, so as to concentrate its rays upon his neighbor's property, and so burns and damages that property, no question would be made of his liability. What difference can there be between such a case and the inducing of a damaging current on plaintiff's wires. The way in which the force acts may not be as well understood as in the case of the mirrors and the rays, in that of electric induction, but the fact of the cause and the result is quite as clear. The contention by the defendant that the plaintiff, in resisting injury which reaches it through the medium of the earth and the air, where the defendant is the known moving cause of such injury, is making a claim to the exclusive use of the earth, is misleading, until it is examined, when it becomes apparent that the same claim might be made as to percolating waters, as to heat, as to smoke, and as to odors. The fact is, nuisances are generally injuries arising from a cause which is not in contact with the property injured, and, which must have come through the medium of the earth or the air, or the waters under the earth. * * * The order of the court will therefore be that the defendant be enjoined perpetually from the use of the system of electric railway propulsion as now operated by it, or any other which will occasion similar disturbances to those now caused by defendant's single trolley system.

AN interesting question in the law of corporations and the issue of stock was involved in the decision of Farrington v. South Boston Ry. Co., 23 N. E. Rep. 109, by the Supreme Court of Massachusetts. There it was held that a person taking in pledge a certificate of stock newly issued in his name by an officer of a corporation, as security for the private debt of the officer, is required to investigate the title to the stock, and is affected with notice of whatever he might have found out if he had made proper inquiry, where the officer is one having the power, either alone or with others, to issue stock certificates. Field, J., says:

The present case cannot be distinguished in principle from Moores v. Bank, 111 U. S. 156 4 Sup. Ct. Rep. 345. In that case Mr. Justice Bradley dissented, and the decision has been the subject of some criticism. Low. Tr. Stocks, § 112, note 2. The ground of that decision, as stated in the opinion, is as follows: The plaintiff "having distinct notice that the surrender and transfer of a former certificate were prerequisites to the lawful issue of a new one, and having accepted a certificate that she owned stock without taking any steps to assure herself that the legal prerequisites to the validity of her certificate, which were to be fulfilled by the former owner, and not by the bank, had been complied with, she does not, as against the bank, stand in the position of one who receives a certificate of stock from the proper officers without notice of any facts impairing its validity." Upon a review of the authorities in the opinion it is said: "This review of the cases shows that there is no precedent for holding that the plaintiff, having dealt with the cashier individually, and lent money to him for private use, and received from him a certificate in her own name, which stated that shares were transferable only on the books of the bank, and on surrender of former certificates, and no certificate having been surrendered by him or by her, and there being no evidence of the bank's having ratified or received any benefit from the transaction, can recover from the bank the value of the certificate delivered to her by its cashier." In that case the president of the bank had left blank certificates of stock, signed by him, with the cashier, as in the present case the president of the railroad company had left similar blank certificates with the treasurer. At the trial of that case in circuit court, a verdict was directed for the defendant on the ground that "the plaintiff having had knowledge of the fact that Moores, upon whom she relied to have the stock transferred to her, was acting for himself as well as in his capacity of cashier,—that is, acting for the bank on one side, and for himself on the other, in referring to the matter of issuing this certificate,—she is not, in the judgment of this court, an innocent holder or the stock." 15 Fed. Rep. 141.

We have decided, in Craft v. Railroad Co., 22 N. E. Rep. 917, that the purchaser of stock owes no positive duty to the corporation to see to it that the seller surrenders the old certificate, and makes an assignment of the stock on the books of the company; but that it is the duty of the corporation, which requires these things to be done, to see that they are done before a new certificate is issued to the purchaser. The plaintiff in the case at the bar was not a purchaser of stock, and he knew that he was dealing with the treasurer of the defendant in his personal capacity, as a borrower of money. If the by-laws of the company had provided that certificates of stock should be signed only by the treasurers, and if he were charged with the duty of attending to the transfer of stock and the issuing of certificates, any person lending money to him for his private use, and taking in his own name a certificate of the company's stock as collateral security, would reasonably be required to investigate the

title of the treasurer to the certificate delivered, because in issuing such a certificate the treasurer would have a personal interest adverse to that of the corporation. An agent cannot properly act for his principal and himself when their interests are adverse, and any person dealing with an agent in a matter affecting his principal, and knowing that the interests of the agent are adverse to those of his principal, ought to be held to the duty of ascertaining that the acts of the agent are authorized by his principal. The difficulty in the present case is that these considerations are only partially applicable to it. It is on account of the danger that one officer may abuse his power to issue stock certificates that the by-laws of corporations usually require the certificates to be signed by at least two officers of the corporation. If one of these neglects his duty, or delegates the performance of it to the other, the safe-guard intended by this requirement of the by-laws becomes ineffectual; and if one of these officers, in issuing a stock certificate, has on a personal interest adverse to that of the corporation, a person dealing with him, and knowing this, may well be required to take notice that the rights of the corporation are not protected in the transaction to the full extent intended by the by-laws.

The decision of this case, we think, must depend upon the question whether it is shown that the plaintiff, in taking this certificate of stock under the circumstances set out in the agreed statement of facts, acted in good faith, and with due care. We are of opinion that the facts were such that the plaintiff was reasonably put upon inquiry as to the title of Reed to the certificate of stock which he undertook to pledge, and that the plaintiff is to be affected with notice of whatever he might have found out, if he had made proper inquiry. As the plaintiff was not a purchaser of stock in the market, the usages of brokers in regard to the manner in which stock is transferred, as between the parties to a bargain and sale, have no bearing upon the case. The plaintiff cannot rely upon any representations of Reed, because he knew that Reed was acting for himself in borrowing the money and in pledging the stock. The seal of the corporation might well be presumed to be under the control of Reed for the purpose of affixing an impress of it upon the stock certificates, because he was one of the persons who was required to sign certificates of stock, and was the person who had the custody of the certificate and transfer book. The genuine signature of the president of the corporation upon the certificate was the only fact on which the plaintiff had a right to rely, but, as the president was not attending personally to the issue of this certificate, it was evident to the plaintiff that Reed might possibly be using for one purpose a certificate signed by the president for another. The certificate was filled up in Reed's handwriting, and nothing whatever was exhibited to the plaintiff tending to show that Reed owned any stock, or that any transfer of stock had been made to the plaintiff by Reed, except the new certificate, which was issued to the plaintiff after the bargain between him and Reed had been made.

We think that this is a safe and more reasonable rule to hold that a person taking in pledge a certificate of stock, newly issued in his name by an officer of a corporation as security for the private debt of the officer, should be required to investigate the title to the stock, if the officer is one who has the power, either alone, or with others, to issue stock certificates, than to hold that such a person can rely upon a certificate so issued to him in the absence of actual notice or knowledge that it has been fraudulently issued.

THE question as to the latitude to be allowed a prosecutor in the cross-examination of a witness for the defense came before the Supreme Court of Oregon in State v. Olds, 22 Pac. Rep. 940. There it was held that, while in a criminal case, the district attorney has the right to cross-examine a witness for the defendant as to anything that would show his interest in the result of the trial, and anything he did in aid of the defendant about the trial, for the purpose of enabling the jury to properly weigh the evidence of such witness, and to intelligently pass upon his credibility, yet the first rule in the production of evidence is that the evidence offered must correspond with the allegations, and be confined to the point in issue. This rule excludes all evidence of collateral facts, or those which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute; and where the defendant called a witness who gave evidence material to the defense, and then testified on cross-examination that he gave money himself to assist the defense, and procured money from others in Portland, Tacoma and Seattle for the same purpose, *held*, it was not competent, either on the cross-examination of the same witness, or by making him the State's witness, to prove the names of the particular persons, who were not witnesses in the case, who contributed money, or that they were saloon keepers or gamblers. Lord, J., dissented from this conclusion in a vigorous opinion. The court, through Strahan, J., says:

The State had the right, on the cross-examination, to ask this witness anything that would show his interest in the result of the trial, and anything he did in aid of the defendant about the trial, for the purpose of enabling the jury to properly weigh his evidence, and to inteligently pass upon his credibility. This was done without objection. Upon the argument here, the district attorney conceded that the examination by which the above facts were elicited from the witness Williams was not cross-examination, but that in asking those questions he made the witness his own, and that the facts were to be regarded as the original evidence introduced on the part of the State; and this presents the real question to be determined by this court. Was it competent for the State to prove, as independent facts, that certain saloon keepers and gamblers in the city of Portland contributed in making a defense in this case? This question may be answered by referring to one or two of the plainest and simplest elementary rules of the law evidence. "And it is an established rule, which we state as the first rule governing in the production of evidence, that the evidence offered must correspond with the allegations, and be confined to the point in issue." 1 Greenl. Ev. § 51. A

few cases may be cited in which this rule has been indirectly or incidentally applied: Campbell v. State, 8 Tex. App. 84; Watson v. Com., 95 Pa. St. 418; Cesure v. State, 1 Tex. App. 19; Pinckord v. State, 13 Tex. App. 468 State v. Lapage, 57 N. H. 245; Farrer v. State, 2 Ohio St. 54; State v. Miller, 47 Wis. 530, 3 N. W. Rep. 31; Com. v. Campbell, 7 Allen, 541; Hall v. State, 51 Ala. 9; Brock v. State, 26 Ala. 104; Rogers v. State, 62 Ala. 170. And it is equally as well settled that this rule excludes all evidence of collateral facts, or those which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute; and the reason is said to be that such evidence tends to draw away the minds of the jurors from the point in issne, and to excite prejudice and mislead them; and moreover, the adverse party, having had no notice of such a course of evidence, is not prepared to rebut it. 1 Greenl. Ev. § 52. The evidence objected to did not in any manner relate to the killing of Emil Weber by the defendant, or have any connection whatever with that event; and it in no manner tended to connect the prisoner with the killing, or accounted for his actions or motives. To make the absurdity of such a rule as the State tries to apply in this case more apparent, let us suppose that a considerable number of the best people of the city of Portland, or of the whole State, saw proper to raise a fund to hire lawyers to assist in conducting this prosecution, could those facts be shown by the State for the purpose of throwing the moral force of their influence with the prisoner? Or let it be supposed that the same class of people contributed a fund to assist the appellant in his defense, could the fact be proven on his behalf for the purpose of exciting sympathy in his behalf with the jury? If such evidence as this would not be admissible, on what principle, can it be claimed that the fact that saloon keepers and gamblers contributed money to assist the defense may be proven by the State against the prisoner? For what purpose was such evidence offered? Manifestly, for the purpose of arousing a prejudice in the minds of the jury against the prisoner, and of exciting a feeling of hostility against him, growing out of the fact that lawless and immoral people were actively interesting themselves in his defense. Of course, we cannot say that such evidence did have that effect upon the minds of the jurors; but such was its tendency, and it is sufficient for this case that it might have had that effect. When illegal evidence is allowed to go to the jury, and particularly in a criminal case, and more especially where life is involved, we will not speculate upon its possible consequences. Such an error presumptively injures the party against whom such evidence is admitted, and ordinarily entitles such party to a new trial.

WHO MAY BE EXECUTORS OR ADMINISTRATORS.

In General.—In general, unless expressly forbidden, all persons are capable of being made executors who are capable of making wills,[1] including in England, under the common-law doctrine,[2] the king, an alien or non-resident, and a corporation sole.[3] All persons incapable of being executors are also disqualified for the office of administrator.[4] Furthermore, by the common-law attainder of treason or other lawful disability, outlawry, and bankruptcy were disqualifications for the office of administrator, though not for that of executor; for the statute[5] commands the ordinary to grant administration to the lawful friends of the deceased.[6]

Non-residents.—In the United States, the right of non-residents to become executors or administrators is regarded by local legislation not by any means uniform. But what has been termed the better policy favors such rights, provided that adequate security be furnished for protecting the interests of parties dwelling within the State. At all events, the non-resident may often designate the party resident who is to represent him; while as between citizens of different States, a rigid rule of exclusion has been regarded as seeming especially harsh.[7] The exact scope of statutes of this character will more particular appear from the instances of construction next given. The statute of New York, which provides that an executor shall not be an alien non-resident of the State, excludes only those who are both not citizens of the United States and non-residents of New York.[8] In Louisiana, non-resident executors are qualified by giving the bond alone, and the oath need not be repeated.[9] In Wisconsin, the language of the statute, "if any executor shall reside out of this

[1] See Berry v. Hamilton, 12 B. Mon. 191, 54 Am. Dec. 515, 517.

[2] See Cutter v. Howard, 9 Wis. 309, 315.

[3] See 2 Bl. Com. 503; Swinb. pt. 5, § 1, pl. 1; Carvoom's Case, Cro. Cas. 8; Co. Litt. 129 *b*; Wms. Exrs. (7th Eng. ed.), 228; 7 Am. & Eng. Encycl. of Law, 171. Consult also, in general, note to Berry v. Hamilton, 54 Am. Dec. 518; Stewart's Appeal, 56 Me. 300.

[4] Wms. Exrs. (6th Am. ed.), 513.

[5] 31 Edw. 3, ch. 2.

[6] Wms. Exrs. (6th Am. ed.), 515. It is no objection, however, to the grant of letters of administration to the daughter of an intestate of Maryland that she is a nun in a convent in the District of Columbia: Smith v. Young, 5 Gill, 197. For basis of foregoing matter as to persons disqualified to be administrators, see 7 Am. & Eng. Encycl. of Law, 174.

[7] Schs. Exrs. & Admrs. 32. See Hammond v. Wood, 15 R. I. 566; Martin v. Duke, 5 Redf. 597. Consult also Cutter v. Howard, 9 Wis. 309, 315.

[8] McGregor v. McGregor, 3 Abb. App. Dec. 86.

[9] Bodenheimer's Succession, 35 La. Ann. 1034. As to taking the oath of allegiance, see Vogel v. Vogel, 20 La. Ann. 181. For basis of foregoing matter as to non-resident executors and administrators, see 7 Am. & Eng. Encycl. of Law, 171, 172; Cutter v. Howard, 9 Wis. 309, 315; Hammond v. Wood, 15 R. I. 566.

State," is regarded as clearly indicating that a non-resident may be appointed.[10] At common law, as already indicated, the grant of administration to a non-resident was sanctioned.[11] In some of the States, however, a non-resident cannot be an administrator.[12] But in other States a non-resident may be appointed administrator.[13] And in South Carolina the sureties on the non-resident administrator's bonds may also be non-residents.[14]

Preference to Residents.—In some of the States, where non-residence, though an objection to the appointment, is not an absolute disqualification, it is nevertheless the rule that as between the next of kin, some resident and others non-resident, residents, if otherwise suitable, are entitled to preference.[15] And it has been said that under ordinary circumstances the court should prefer a resident who is not a distributee to a non-resident who is.[16] When in fact, several persons are of the same degree of kindred to the deceased, one living out of the State is not entitled to administer as of right,[17] but in case those living in the State are unsuitable, upon stronger grounds, the non-resident may, at the discretion of the court, be appointed upon the non-residence terms.[18]

Nominee of Non-resident.—Sometimes a resident nominee of a non-resident kinsman may be appointed where no suitable kinsman within the State desires to administer.[19] The English practice also recognizes the grant to attorney of the next of kin residing abroad.[20] In California, a non-resident in general is not only incompetent to serve as administrator, but also to nominate a substitute;[21] though a non-resident surviving husband and wife may nominate some competent person to serve as administrator.[22]

Aliens, Outlaws, etc.—Aliens, unless excluded by statute[23] may accept the appointment of administrator.[24] Outlaws, or persons attainted, might at common law, sue as executors because they sue in *autre droit*, and if after testator's death the executor was convicted of felony, the office, being *in autre droit*, was not forfeited by the conviction.[25] Where the statute provides that no letters of administration shall be granted to a person convicted of an infamous crime, no degree of legal or moral guilt or delinquency is sufficient to exclude a person from the administration, as the next of kin, in the cases of preference given by the statute, unless such person has been actually convicted of an infamous crime.[26] And the conviction intended by the statute must be upon an indictment or other criminal proceeding.[27] Insane persons, whether idiots or lunatics,

[10] Cutter v. Howard, 9 Wis. 309, 315. So, in Rhode Island, residence in another State has been considered not an insuperable objection to the appointment of an executrix: Hammond v. Wood, 15 R. I. 566, 567.

[11] See Jones v. Jones, 12 Rich. 623, 627.

[12] Estate of Bush, 63 Cal. 458; Estate of Hyde, 64 Cal. 228; Child v. Gratiot, 41 Ill. 357; Radford v. Radford, 5 Dana, 156; note to Berry v. Hamilton, 54 Am. Dec. 521. See also Sarkie's Appeal, 2 Pa. St. 157, 159. In California a statutory statement that when the person entitled is a non-resident, his identity may be proved in a certain way, cannot be construed to repeal a prior provision of the same general enactment which positively declares that no person is competent or entitled to serve as administrator who is not a *bona fide* resident of this State: Estate of Beach, 63 Cal. 458, 460, holding that the later provision, providing for a contingency which cannot arise under the existing law, will be regarded as remaining practically inoperative.

[13] Estate of Barker, 2 Leigh, 719, 720; Jones v. Jones, 12 Rich. 623, 625, 626; note to Berry v. Hamilton, 54 Am. Dec. 521.

[14] Jones v. Jones, 12 Rich. 623, 627.

[15] Wickshire v. Chapman, 15 Barb. 302; Pickering v. Poindexter, 46 N. H. 69; Chicago, etc. R. Co. v. Gould, 64 Iowa, 343.

[16] Bridgeman v. Bridgeman, 3 S. E. Rep. (W. Va.) 580; quoting Child v. Gratiot, 41 Ill. 359; Railway Co. v. Gould, 64 Iowa, 343, 20 N. W. Rep. 464.

[17] Pickering v. Poindexter, 46 N. H. 69.

[18] Pickering v. Poindexter, 46 N. H. 69. For basis of foregoing matter concerning preferences to non-residents, see 7 Am. & Eng. Encycl. of Law, 175; Bridgeman v. Bridgeman, 3 S. E. Rep. 580.

[19] Smith v. Munroe, 1 Ired. 345, 351; 7 Am. & Eng. Encycl. of Law, 175.

[20] Wms. Exrs. (7th Eng. ed.), 437; 7 Am. & Eng. Encycl. of Law, 175, citing also goods of Burch, 2 Su. & Tr. 139.

[21] Estate of Beech, 63 Cal. 458, 459; Estate of Hyde, 64 Cal. 228. As to preference of public administrator over appointee of foreign executor renouncing letters testamentary, see *In re* Garber, 74 Cal. 338.

[22] Estate of Cotter, 54 Cal. 215; *In re* Stevenson, 72 Cal. 164, 165.

[23] As under N. Y. Rev. Stats. 75, § 32.

[24] Wms. Exrs. (7th Eng. ed.) 449; 7 Am. & Eng. Encycl. of Law, 175.

[25] Wms. Exrs. (6th Am. ed.) 515; 7 Am. & Eng. Encycl. of Law, 174. See also Berry v. Hamilton, 12 B. Mon. 191, 54 Am. Dec. 515, 516.

[26] Coope v. Lowene, 1 Barb. Ch. 45, 47.

[27] Coope v. Lowene, 1 Barb. Ch. 45, 47. It is further requisite that the crime should be infamous in the sense of being punishable with death or confinement in a State's prison, and that the conviction shall be by a court of the State in which the disqualification is sought to be enforced: O'Brien v. Neubert, 3 Dem. 156, 67 How. Pr. 503.

are incapable of becoming executors; and if the executor becomes insane after having entered upon the duties of his office, he may be removed by the court and administration granted to another.[28] The peculiar rules of distribution as defined by statute must be applied for determining the right to administer, whether the case be one of an illegitimate decedent or of an illegitimate relationship to a decedent.[29]

Infants.—Infancy is no disqualification to being executor, even though the infant be *en ventre sa mere.*[30] Yet, modern statutes disqualify an infant who has been appointed executor from exercising the functions of his office during minority; and letters *cum testamento annexo* are issued to some fit person until the infant attains his majority.[31] But in England, prior to the enactment on the subject, an infant seventeen years old might act as executor,[32] and the act itself only applies in case of an infant being sole executor.[33] It is also the legal doctrine that a minor cannot be an administrator,[34] and it is error to appoint a wife administratrix of her deceased husband, if she is a minor.[35] If the person entitled to administration be a minor the probate court may appoint an administrator during such minority,[36] but the minor cannot select the person to be appointed.[37]

Married Women.—A married woman under the common-law doctrine[38] may be executrix with her husband's consent;[39] but he cannot compel her to accept the trust,[40] though, if without his privity she actually administers, and an action subsequently be brought against them, they will be estopped from pleading that she was not executrix;[41] and it has been held that after the husband's objection, where the wife is named sole executrix, the grant may be made to her attorney.[42] But in various of the States the right of a married woman to act as executrix or administratrix is the subject of statutory regulation.[43] Yet, irrespective of such statutes, the right of administration is possessed by married women under certain circumstances. Thus a married woman may

[28] Bac. Abr. Exrs. A. 5; 1 Salk. 36; 1 Wms. Exrs. 238; Schoul. Exrs. and Admrs. § 33; Evans v. Tyler, 2 Robertson, 128. See 7 Am. & Eng. Encycl. of Law, 174. Consult also Berry v. Hamilton, 12 B. Mon. 191, 54 Am. Dec. 515, 517, and note, 518.

[29] Schoul. Exrs. and Admrs. § 108; Wms. Exrs. 433; Schoul. Dom. Rel. § 276; 7 Am. & Eng. Encycl. of Law, 176, citing also *Re* Goodman, L. R. 17 Ch. D. 266; Fernie v. Pub. Admr., 3 Bradf. 249; Pub. Admr. v. Hughes, 11 Bradf. 125; Pico's Estate, 56 Cal. 413.

[30] Wms. Exrs. (6th Am. ed.), 271; Piggott's Case, 5 Co. 29 *a;* 2 Bl. Com. 503. See also note to Berry v. Hamilton, 54 Am. Dec. 518.

[31] Stat. Geo. III. ch. 87, § 6. As to American statutes, see Christopher v. Cox, 25 Miss. 162; Schoul. Dom. Rel. § 416.

[32] Schoul. Exrs. and Admrs. § 32, n.

[33] Wms. Exrs. (7th Eng. ed.) 232. For if there are several executors, and one of them is of full age no administration *durante minore ætate* ought to be granted, for he who is of full age may execute the will: *Ibid.* It has been said in that country (though this has since been doubted: Wms. Exrs. as first cited) that if it be a woman infant who is made executrix, and if her husband be of age and assent, it is as if she were of age, and her husband shall have execution of the will. And in an early case it was resolved by the justices of the common pleas, that if administration be committed during the minority of the administratrix, and she takes husband of full age, then the administration shall cease: Prince's Case, 5 Co. B. It has been the practice of the English spiritual courts to grant administration to the guardian whom that court has a right to appoint for the personal estate: In the Goods of Weir, 2 Su. & Tr. 451; Brotherhood v. Harris, 2 Cas. Temp. Lee, 131. For basis of foregoing matter concerning infancy as disqualification to executor, see 7 Am. & Eng. Encycl. of Law, 173, and note to Berry v. Hamilton, 54 Am. Dec. 518.

[34] Note to Berry v. Hamilton, 54 Am. Dec. 521, citing Wms. Exrs. 450; In the Goods of the Duchess d'Orleans, 1 Su. & Tr. 253; Abbott v. Abbott, 2 Phillim. 578; Collins v. Spears, 1 Miss. (Walk.) 310; Carou v. Mowatt, 2 Edw. Ch. 57.

[35] Collins v. Spears, Walk. (Miss.) 310, 311.

[36] Pitcher v. Annat, 5 How. (Miss.) 288, 289. See also McGooch v. McGooch, 4 Mass. 348, 349.

[37] Rea v. Englesing, 56 Miss. 463, 465. Under the construction given to statutory provisions in Louisiana the emancipation effected by the marriage of a minor does not qualify her to receive the appointment of administratix: Briscoe v. Tarkington, 5 La. Ann. 692, 693.

[38] See Palmer v. Oakley, 2 Doug. 433, 47 Am. Dec. 41, 51.

[39] Wms. Exrs. (6th Am. ed.) 272; Stewart's App., 56 Me. 300; English v. McNair, 34 Ala. 40; Taylor v. Allen, 2 Ark. 212.

[40] 3 Bac. Abr. (Gwillim's ed.) 9, tit. Executors A; 8 Wentw. Off. Ex. (14th ed.) 377; Wms. Exrs. (6th Am. ed.) 272. See also Fonblanque's note (h) to Treat. on Eq. bk. 1, ch. 2, § 6.

[41] Wms. Exrs. (6th Am. ed.) 273, citing Godolph, pt. 2, ch. 10, § 4; Wentw. Ex. (14th ed.) 377, 378; 3 Bac. Abr. (Gwillim's ed.) 9, tit. Executors A. 8; Russell's Case, 5 Co. 27 *b*, n. B. Compare Wentw. Off. Ex. (14th ed.) 378; English v. McNair, 34 Ala. 40.

[42] Clarke v. Clarke, L. R. 6 C. P. D. 103. See for basis of foregoing matter concerning married woman as executrix, 7 Am. & Eng. Encycl. of Law, 172, 173; note to Berry v. Hamilton, 54 Am. Dec. 518; Palmer v. Oakley, 2 Doug. 433, 47 Am. Dec. 41, 51.

[43] See note to Berry v. Hamilton, 54 Am. Dec. 518. Under the laws of Maryland, for example, a married woman may act as executrix or administratrix: Binneman v. Weaver, 8 Md. 517, 523.

administer, with the consent of her husband; and if he joins in the bond, his consent is sufficiently shown.[44] So it has been said that in the absence of proof to the contrary, administration taken by the wife during coverture must be presumed to have been with the consent of the husband.[45] The administration of a married woman, however, like that of an infant or alien, might be at any time revoked by an appropriate proceeding; but in the absence of such revocation, it is not to be deemed a nullity.[46]

Statute Concerning Marriage of Executrix.—It has been contended that the familiar statutory provision for the termination of the authority of an executrix who marries, impliedly makes a married woman incapable of appointment as executrix.[47] But in Maine it has been held that the statute cannot be so extended by implication.[48] In Rhode Island, however, where this point is not decided, a different result is reached by the construction of another statutory provision, under which the married women might be required to give a personal bond, for which no substitute is held sufficient.[49]

Separated Spouses.—Separation alone does not deprive a wife of her right to administer upon the estate of her husband; for the marriage not having been dissolved, she is still his widow.[50] Nor will separation, or indeed anything short of a divorce or possibly a conviction for crime, deprive the husband of his right to administer on his wife's estate.[51]

Wife's Statutory Right.—In England, New York, and Massachusetts, and some other States, married women may administer as if they were sole.[52] But the provision of the New York statute making a married woman capable of acting as an administratrix and of receiving letters as such the same as if unmarried,[53] has been held not to repeal a provision[54] giving a preference in the granting of administration to unmarried over married women of equal degree of kindred.[55]

Copartnership.—A copartnership may be executor in the sense that the individual members composing it, and not the firm collectively, are entitled to the trust.[57]

Surviving Partners.—A surviving partner of the intestate cannot, under the construction given to prohibitory provisions in the statutes of some of the States, be appointed administrator of the latter's estate;[57] and this restriction is enforced even against a brother who would otherwise be entitled to administer.[58] Indeed, it has been declared that a surviving partner should never be appointed administrator on the estate of his deceased associate, because, as such survivor, he becomes accountable to the estate, and could not well account to himself as its representative.[59]

Corporations.—It has long been doubted whether or not a corporation aggregate can be executor.[60] The principal objections to their accepting their trust are that they cannot prove a will, or take the oath for the due execution of the office; that they cannot be fieoffees in trust to others' use; and that they

[44] Gyger's Estate, 65 Pa. St. 311. See also English v. McNair, 34 Ala. 40; 1 Wms. Exrs. (6th Am. ed.) 517. Compare Airhart v. Murphy, 32 Tex. 131; Cassidy v. Jackson, 45 Miss. 391.

[45] Adair v. Shaw, 1 Sch. & Lef. 267; 7 Am. & Eng. Encycl. of Law, 174, 175. Under the statutes of Alabama (Code, §§ 1660, 1673, 1683), as at common law, administration may be granted to a married woman, if her husband consent to her appointment; and when the validity of her administration is collaterally assailed, her husband's consent will be presumed: English v. McNair, 34 Ala. 40, 48.

[46] English v. McNair, 34 Ala. 40, 49, citing 1 Wms. Exrs. 489-490; 1 Lomax Exrs. 359 marg. 195; Palmer v. Oakley, 2 Doug. 433; Ray v. Doughty, 4 Blackf. 115.

[47] See Hammond v. Wood, 15 R. I. 566, 568.

[48] Stewart's Appeal, 56 Me. 300, 302.

[49] Hammond v. Wood, 15 R. I. 566, 568, 569; relying as to the giving of a bond upon the analogy of Townsend v. Hazard, 7 R. I. 254.

[50] Nusz v. Grove, 27 Md. 391, 400; nor does separation deprive the wife of her right to nominate a substitute to administer upon the estate of her son: Goods of Hardinge, 2 Curt. Eccl. 640. Compare Goods of Maychell, 26 Week. Rep. 439.

[51] Case of Jacob Altemus, 1 Ashm. 49, 50. See to like effect, note to Berry v. Hamilton, 54 Am. Dec. 521.

[52] N. Y. Laws of 1867, ch. 782, § 2; Mass. Stats. of 1874, ch. 184, § 4; 7 Am. & Eng. Encycl. of Law, 175; referring also to Binneman v. Weaver, 8 Ind. 617; *In re* Stewart, 56 Me. 300 (both of which relate particularly to a wife as executrix), and as to character of these and analogous statutes in other States, to Schoul. Husb. & Wf. App'x., and also to *Re* Curser, 2 Hun, 579, 89 N. Y. 401.

[53] N. Y. Laws of 1867, ch. 782, § 2.

[54] 2 N. Y. Rev. Stats. 74, § 28.

[55] *Re* Curser, 89 N. Y. 401, 403.

[56] *In re* Fernie, 6 Notes of Cas. (Eng.) 657; 1 Wms. Exrs. (7th Eng. ed.) 229. See 7 Am. & Eng. Encycl. of Law, 172.

[57] Connell v. Gallagher, 16 Cal. 367. See also *In re* Garber, 74 Cal. 338, 341.

[58] Connell v. Gallagher, 16 Cal. 367.

[59] Howard v. Slagle, 52 Ill. 336, 338. See to like effect, Estate of Brown, 11 Phila. 127; note to Berry v. Hamilton, 54 Am. Dec. 521.

[60] 1 Wms. Exrs. (7th Eng. ed.) 228, 229.

are a body framed for a special purpose.[61] Modern English practice, however, recognizes the right of a corporation so named to appoint persons styled "syndics"[62] to receive administration with the will annexed, and be sworn like other administrators.[63] But the general tendency of authority in the United States is to exclude corporations unless the right to act as executors or administrators has been expressly conferred by the charter.[64] A corporation cannot lawfully be appointed administrator unless the power to administer has been expressly conferred by its charter.[65]

Trustee.—The trustee of a fund for the purpose of paying the same over to another is not, under the New York statutes, entitled to administer to the same extent as if he were the owner of the fund.[66] But the right to administer in such a case is in the *cestui que trust* whose interest is to be protected; and if such beneficiary is not a natural person, but a corporation, and therefore incompetent, then the next person named in the statute is entitled to administration.[67]

Drunken and Improvident Persons, etc.—It would unduly extend the present article to enter fully into disqualifications connected with the moral, mental or financial fitness of the party applying to be appointed executor or administraior. Yet an outline of the nature and extent of these disqualifications is necessary to make this survey of the subject complete. In the absence of express legislation, which, however, regulates the subject in a number of the States, the character of the proposed appointee is immaterial,[68] and immorality is no ground for a refusal to qualify.[69] Drunkenness as a disqualification is the subject of statutory enactment and interpretation.[70] Improvidence and want of understanding are also frequently made disqualifications by statute, sometimes in connection with drunkenness and lack of integrity.[71] Poverty or insolvency, however, is no objection to the person designed as executor.[72] But insolvency has always been held an insuparable objection to the grant of letters of administration.[73]

NATHAN NEWMARK.

San Francisco, Cal.

[61] 1 Bl. Com. 447; Com. Dig. Admrs. B. 2; Wentw. Off. Ex. (14th ed.) ch. 1, bk. 39. But see *contra*, Swinb. pt. 5, § 9; Godolph, pt. 2, ch. 1, § 1; 1 Roll, Abr. tit. Executors T. 7; citing 12 E. 4, 9 *b*.

[62] See Goods of Stark, 1 Su. & Tr. 516.

[63] Wms. Exrs. (6th Am. ed.) 269.

[64] Georgetown College v. Browne, 34 Md. 450; Thompson's Est., 33 Barb. 334; Porter v. Trall, 30 N. J. Eq. 106. See, for basis of foregoing matter, 7 Am. & Eng. Encycl. of Law, 172. Consult also note to Berry v. Hamilton, 54 Am. Dec. 518.

[65] 7 Am. & Eng. Encycl. of Law, 176.

[66] Matter of Thompson's Estate, 33 Barb. 334, 335.

[67] Matter of Thompson's Estate, 33 Barb. 334, 335.

[68] See School. Exrs. & Admrs. § 33. As to unsuitableness, see Stearns v. Fisk, 18 Pick. 24, 27. As to irreconcilable hostility to co-trustees, see Deraisnes v. Dunham, 22 How. 86.

[69] Berry v. Hamilton, 12 B. Mon. 193, 54 Am. Dec. 515, 516. But compare Est. Plaisance, Myrick's Prob. Rep. (Cal.) 117. As to moral fitness or delinquency in New York, see Coggshall v. Green, 9 Hun, 471; Coope v. Lowene, 1 Barb. Ch. 45, 47.

[70] Elmer v. Kechele, 1 Redf. 472, 473. Compare *Re* Cady, 36 Hun, 122. But as to Pennsylvania doctrine, see Sill v. M'Knight, 7 Watts. & S. 244, and reference in Imhoff v. Wintner's Admrs., 31 Pa. St. 243, 244.

[71] See note to Berry v. Hamilton, 54 Am. Dec. 520; Estate of Plaisance, Myr. Prob. Rep. (Cal.) 117; McGregor v. McGregor, 3 Abb. App. Dec. 92: Coope v. Lowene, 1 Barb. Ch. 45, 47; Coggshall v. Green, 9 Hun, 47; McMahon v. Harrison, 6 N. Y. 443, 448; O'Brien v. Neubert, 3 Dem. 156, 162; Goods of Shilton, 1 Tuck. 73. As to old age and bodily ailments, see Matter of Bemin, 3 Dem. 263, 264. As to illiteracy, see Gregg v. Wilson, 24 Ind. 227; Nuss v. Grove, 27 Ind. 391, 401; Pacheco's Estate, 23 Cal. 476, 480; Stephenson v. Stephenson, 4 Jones L. 472, 473.

[72] See 7 Am. & Eng. Encycl. of Law, 173, 174; Shields v. Shields, 60 Barb. 56; note to Berry v. Hamilton, 54 Am. Dec. 519, 520; Wilson v. Whitfield, 38 Ga. 269, 283. As to requirement in statute that "circumstances" of an executor shall afford "adequate security," etc., see Martin v. Duke, 5 Redf. 597. As to intemperate habits reducing applicant to insolvency, see *Re* Cady, 36 Hun, 122. As to executor offering solvent securities, see Halbrook v. Head (Ky.), S. W. Rep. 592.

[73] Cornpropst's Appeal, 33 Pa. St. 537, 538. See to like effect, note to Berry v. Hamilton, 54 Am. Dec. 521.

CONTRACTS—BREACH—INJUNCTION.

CORT v. LASSARD.

Supreme Court of Oregon, December 9, 1889.

1. Where a contract stipulates for special, unique, or extraordinary personal services, such as involve special merit, skill, knowledge or ability, so that, in case of default, the same services could not be easily obtained from others, nor be compensated in damages at law, a court of equity would be warranted in applying its preventive remedy by injunction. Otherwise, if such service were ordinary, and without special merit, and such as could be easily supplied, without much difficulty or expense.

2. The principle is that contracts for such services are personal and peculiar.

LORD, J.: This is a suit wherein the plaintiff, who is a theatrical manager, seeks to enjoin and

prevent the defendants, who are acrobats, from performing at a rival theater in the same place. The plaintiff alleges, among other things, that the plaintiff and defendants entered into a contract whereby it was agreed that the defendants to perform as acrobats exclusively for the plaintiff, during a period of six weeks, at a salary of $60 per week, etc.; that the plaintiff has performed all the conditions of his said contract, and gone to large expense in advertising, etc., and would have derived large emoluments from the performance of the defendants, which are alleged to be unique and attractive; that said defendants, after performing for the plaintiff for the space of three weeks, refused to perform any longer, and engaged themselves to perform as acrobats at another theater mentioned in the city; and that said performance of the said defendants will attract large crowds, etc., and will largely diminish, if permitted to be given, the receipts of of the plaintiff, and cause an irreparable loss, etc., and diminish the attractions of his said theater, etc.; that the said defendants are entirely impecunious, and unable to respond to an action for a breach of the contract, etc. The answer denies nearly all the material allegations, but admits the hiring, etc., and then avers affirmatively that the plaintiff failed to fulfill his part of the contract, etc., and that the plaintiff discharged them, etc.; all of which was put in issue by the reply. Upon all the issues presented by the pleadings, the finding of the court was favorable to the plaintiff, with this exception: "That the performance of the said defendants was not of an unique or unusual character, but that of an ordinary acrobat and tumbler, which could have been easily supplied, with little or no delay or expense; and that said service was of a common and ordinary character, and not such as could be enjoined in equity, for a breach of contract to perform" etc. As a result, the court found, as a conclusion of law, that the plaintiff was not entitled to any relief in equity, and that his suit be dismissed. The contention of counsel for the plaintiff is to this effect: (1) That it is immaterial whether the performance is unique, or involves special knowledge or skill; and (2) that the finding is contrary to the evidence, which will show that the performance was unique and unusual. In this case, there is no negative clause in the contract; but the suit, as decided by the court, assumes and admits that such a stipulation is not a prerequisite to the exercise of jurisdiction, but that it is enough to warrant equity to interfere if the contract alleged to have been broken stipulated for services which are unique and extraordinary in their character, or which involve special skill or knowledge or ability, and provided that such services were to be rendered at a particular place or places and for a specified time.

The question whether a court of equity will apply the preventive remedy of injunction to contracts for the services of professional workers of special merit or leave them to the remedy at law for damages, has been the subject of much discussion, and the existence of the jurisdiction fully established. It in not, perhaps, possible, nor is it necessary, to reconcile the decisions; but the ground of jurisdiction, as not exerted, rests upon the inadequacy of the legal remedy. In an early English case, where the jurisdiction was invoked to prevent the actor Kean from performing at another theater upon a contract for personal services, at which there was a stipulation to the effect that he should not perform at any other theater in London during the period of his engagement, it was held, as the court could not enforce the positive part of the contract, it would not restrain by injunction a breach of the negative part. Kemble v. Kean, 6 Sim. 333. But this case was expressly overruled in Lumley v. Wagner, 1 De Gex. M. & G. 604, upon a like contract for personal services, to sing, during a certain period of time, at a particular theater, and not to sing elsewhere, without written authority, upon the ground that the positive and negative stipulations of such contracts formed but one contract, and that the court would interfere to prevent the violation of the negative stipulation although it could not enforce the specific performance of the entire contract. In delivering this opinion, among other things, the lord chancellor said: "The agreement to sing for the plaintiff, during three months, at his theater, and during that time not to sing for anybody else, is not a correlative contract. It is, in effect, one contract; and though, beyond all doubt, this court could not interfere to enforce the specific performance of the whole of this contract, yet, in all sound construction, and according to the true spirit of the agreement to perform for three months at one theater must necessarily exclude the right to perform at the same time at another theater. It was clearly intended that J. Wagner was to exert her vocal abilities to the utmost to aid the theater to which she agreed to attach herself. I am of opinion that if she had attempted, even in the absence of any negative stipulation, to perform at another theater, she would have broken the spirit and true meaning of the contract, as much as she would now do with reference to the contract into which she has actually entered." In Montague v. Flockton, L. R. 16 Eq. 189, it was held that an actor who enters into a contract to perform for a certain period at a particular theater may be restraned by injunction from performing at any other theater during the pendency of his engagement, notwithstanding that the contract contains no negative clause restricting the actor from performing elsewhere. Referring to Lumley v. Wagner, *supra*, the vice-chancellor said: "It happened that that contract did contain a negative stipulation, and, finding it there, Lord St. Leonards relied upon it; but I am satisfied that if it had not been there he would have come to the same conclusion, and, granted the injunction, on the grounds that Mdlle. Wagner having agreed to to perform at Mr. Lumley's theater, could not at

the same time be permitted to perform at Mr. Gye's. But, however that may be, it is comparatively unimportant, because the subsequent authorities have completely settled this point." As a result of these English authorities, while conceding that specific performance of such contracts could not be enforced, the jurisdiction is established that relief may be granted on a contract for such services, even though it contains no negative clause, upon the ground that a contract to act or play at a particular place for a specified time necessarily implies a prohibition against performing at any other place during that period. The American courts, while they recognize the existence of jurisdiction have exhibited hesitancy in applying it to such enlarged uses. Until Daly v. Smith, 49 How. Pr. 150, was decided, the doctrine of Lumley v. Wagner, *supra*, was either entirely rejected or only partially accepted. Sanquirico v. Benedetti, 1 Barb. 315; Hamblin v. Dinneford, 2 Edw. Ch. 528; Fredricks v. Mayer, 13 How. Pr. 566; Butler v. Galletti, 21 How. Pr. 465; Burton v. Marshall, 4 Gill, 487; Hayes v. Willio, 11 Abb. Pr. (N. S.) 167. In this case (Daly v. Smith, *supra*) the authorities are carefully discriminated, and the injunction was granted restraining an actress from violating her agreement to play at the plaintiff's theater for a stated period; and the case is on all fours with Lumley v. Wagner, *supra*. See, also, Hahn v. Society, 42 Md. 465; McCaull v. Braham, 16 Fed. Rep. 37. In Fredricks v. Mayer 13 How. Pr. 567, and Butler v. Galletti, 21 How. Pr. 466, the court indicates the principle that where the services involve the exercise of powers of the mind, as of writers or performers, which are purely and largely intellectual, they may from a class in which the court will interfere, upon the ground that they are individual and peculiar.

In these cases the element of mind furnishes the rule of distinction and decision, as distinguished from what is mechanical and material, and would exclude professional workers, such as dancers and acrobats, where performances are largely mechanical, however unique or extraordinary such performance may be. But it is apprehended that this distinction cannot be maintained, for the fact is that such actors do often possess special merit of extraordinary qualifications in their line, which makes their professional performances distinctly personal and peculiar; and that, in case of their default on a contract for services, there would be the same difficulty in supplying their places or in obtaining from others the same service, as would happen with actors, whose merits were largely intellectual, showing the same reason to exist as much in the one case as the other for the aplication of the preventive remedy by injunction. Relative to this subject, the authorities indicate that the American courts have refused to interfere unless there was a negative clause forbidding the services sought to be enjoined. Such a stipulation existed in the contract in Daly v. Smith, *supra*, upon which relief was granted although the opinion is broad enough to include contracts withoutsuch stipulations, when the facts show that the contractis reasonable, the complainant without fault, and that he has no adequate remedy at law. To my mind, this is the correct principle to apply to such cases, even though the contract contains no negative stipulation; for in the nature of things, a contract to act at a particular theater for a specified time necessarily implies a negative against acting at any other theater during that time. The agreement to perform at a particular theater for a particular time, of necessity, involves an agreement not to perform at any other during that time. According to the true of spirit such an agreement, the implication precluding the defendant from acting at any other theater during the period for which he has agreed to act for the plaintiff follows as inevitably and logically as if it was expressed. So, that, according to all the authorities, where one contracts to render personal service to another which requires special merit or qualifications in the professional worker, and, in case of default, the same service is not easily obtained from others, although the court will not interfere to enforce the specific performance of the whole contract, yet it will exert its preventive power to restrain its breach. While it is true that the court cannot enforce the affirmative part of such contract, and compel the defendant to act or perform, it can enjoin its breach, and compel him to abstain from acting elsewhere than at plaintiff's theater. The principle upon which this doctrine rests is that contracts for such services are individual and peculiar, because of their special merit or unique character, and the inadequacy of the remedy at law to compensate for their breach in damages. "Where" says Prof. Pomeroy, "a contract stipulates for a special, unique, or extraordinary personal service or acts, or for such services to be rendered or done by a party having special, unique, and extraordinary qualifications, as, for example, by an eminent actor, artist, and the like, it is plain that the remedy at law of damages for its breach might be wholly inadequate, since no amount of money recovered by the plaintiff might enable him to obtain the same, or the same kind, of services or acts elsewhere, or by employing any other person." Pom. Eq. Jur. § 1343. Damages for a breach of such contracts are not only difficult to ascertain, but cannot, with any certainty, be estimated; nor could the plaintiff procure, by means of any damages, the same services in the labor market as in case of an ordinary contract of employment between an artisan, a laborer, or a clerk, and their employer.

It results, then, that if the services contracted for by the plaintiff to be rendered by the defendants were unique or extraordinary, involving such special merit or qualifications in them as to make such services distinctly personal and peculiar, so that, in case of a default by them, the same or like services could not be easily procured, nor be compensated in damages, the court would be war-

ranted in applying its preventive jurisdiction, and granting relief, but otherwise, or denied, if such services were ordinary, and without special merit, and such as could be readily supplied or obtained from others, without much difficulty or expense, But the present case is far from being one of such character as falls under the principle of the authorities in which the preventive remedy by injunction has been allowed. There is absolutely nothing in the evidence to show that the performance of the defendants were unique, or of any special merit. The plaintiff himself will not even admit that they are; while others say the performances were "neat," "pretty good," "do a fair act," etc.; and others, that their performances were merely that of the ordinary acrobat, and that there would be no trouble in supplying their places, or, as one of a good deal of professional experience says, "in getting a thousand to do just as good variety business." Indeed, according to our view of the evidence, the plaintiff fails to make a case within the principle in which equity allows relief for a breach of contract for personal services, and the court below committed no error in dismissing the bill.

NOTE.—I. *Jurisdiction of Courts of Equity—Generally.*—For many years courts of equity refused to entertain jurisdiction in actions upon breach of contract for personal services, leaving the injured party to his action at law for damages caused by such non-performance. Taking the position that where an agreement is of such a nature that it is practically impossible for a court to enforce it, and a bill for injunction is prayed, it is in effect asking for specific performance, and equity will not interfere.[1] As was held in a case where defendant had contracted to take notes of cases heard and determined in certain courts and to publish them in the form of law reports for complainant, but had failed to comply with his agreement, an injunction was refused to prevent him from making reports for persons other than the complainant.[2] And it was formerly held that in cases of contracts for theatrical and operatic performances, a court of equity having no power to compel the performance of the acts required would not interfere by injunction.[3]

One of the earliest American cases on this subject is the case of Burton v. Marshall,[4] decided by the Court of Appeals of Maryland. It was held, upon a contract made by a husband for himself and his wife, that his wife should perform at the theater of the manager named therein, during a certain period, for a certain salary, a court of equity will not enjoin the wife from performing at any other theater, during the same period, nor the husband from permitting her to change her residence, nor another manager from giving her employment within the term as an actress; neither can specific execution of such a contract be decreed.[5] The rule as laid down in these cases has been much shaken, if not wholly overcome by other and later authorities, and while in cases of contracts containing both affirmative and negative stipulations the authorities are conflicting as to whether equity may interfere by injunction to prevent a breach of the negative covenant when the affirmative is of such a nature that it cannot be enforced, the weight of authority seems to be that equity may restrain the violation of the negative stipulation, although it cannot specifically enforce the affirmative one.[6] It was so decreed in Lumley v. Wagner,[7] where defendant, an opera singer, agreed that she would sing at plaintiff's theater during a certain period of time, and would not sing elsewhere without his written authority. It was held, on a bill filed to restrain her from singing for a third party and granting an injunction for that purpose, that the positive and negative stipulations of the agreement formed but one contract, and that the court would interfere to prevent the violation of the negative stipulation, although it could not enforce the specific performance of the entire contract.[8] Even in the absence of any negative stipulation the relief may be allowed, where a negative nature may be implied, as was held where an actor contracts with a theatrical manager to play for a given time at a particular theater, he may be enjoined from acting at any other theater during the period covered by such contract, since a contract to play at a particular theater for a specified time implies a negative against acting elsewhere during that time.[9]

II. *Where Contract Stipulates for Special or Extraordinary Services.*—As has been stated in the principal case, the American courts, although recognizing the jurisdiction of the courts of equity to grant the relief, have not gone as far as the English courts, and are reluctant to grant the relief, except where the services involve the existence of some special merit or qualification such as to make said services distinctly personal and peculiar, so that in case of failure to comply with the contract the like services could not be easily procured, nor be compensated in damages. In such case the American chancery courts have granted an injunction.[10]

In Daly v. Smith, Freedman, J., says: " * * * Upon principle can I conceive of no reason why contracts for theatrical performances should stand upon a different footing than other contracts involving the exercise of intellectual faculties, why actors and actresses should, by the law of contracts, be treated

[1] Hooper v. Brodrick, 11 Sim. 47; Johnson v. Shrewsbury R. Co., 3 DeGex, M. & G. 914.

[2] Clarke v. Price, 2 Wilson Ch. C. 157.

[3] Sanquirico v. Bensdetti, 1 Barb. 315.

[4] 4 Gill (Md.), 487.

[5] This follows in principle the case of Kimble v. Kean, reported in 6 Simons, 333, and to be found in 9 Condensed Cha. Rep. 296. After a full examination of all the cases upon the subject, the vice-chancellor decided "that where the proprietor of Covent Garden Theater agreed with an actor that he should act for twenty-four nights, during a certain period of time, at their theater, and that in the meantime, he should not act at any other place in London, that the court cannot enforce the positive part of the contract, and, therefore, it will not restrain by injunction a breach of the negative part." And in Kimberly v. Jennings, 6 Sim. 340, and also reported in 9 Cond. Ch. Rep. 300, it was in like manner determined, that where a party agreed not to do a particular act, and there are other terms in the agreement, the court will not grant an injunction to restrain the breach of the negative term.

[6] High on Injunctions, § 1164.

[7] 1 DeGex, M. & G. 604, affirming s. c., 5 DeG. & Sm. 485; also Montague v. Flocton, 16 L. R. Eq. Cas. 189.

[8] Wolverhampton v. London Ry., L. R. 16 Eq. 433; Ward v. Buton, L. R. 19 Eq. 207; Donnell v. Burnett, L. R. 22 Ch. Div. 855; Fothergill v. Rowland, 17 Eq. 122, 141.

[9] Montague v. Flocton, L. R. 16 Eq. 189; Webster v. Dillon, 3 Jur. (N. S.) 432.

[10] Daly v. Smith, 49 How. 150; Fredericks v. Mayor, 13 How. 566; Butler v. Gallettl, 21 How. 465; Hahn v. Society, 42 Md. 465; McCaull v. Braham, 16 Fed. Rep. 37.

as a privileged class, or why theatrical managers, who have to rely upon their contracts with performers of attractive talents to carry on the business of their theaters, should * * be left completely at the mercy of their performers. On the contrary, I am of the opinion that actors and actresses, like all other persons, should be held to a true and faithful performance of their engagements, and that whenever the court has not proper jurisdiction to enforce the whole engagement, it should, like in all other cases, operate to bind their consciences, at least as far as they can be bound, to a true and faithful performance.

LEWIS P. CLOVER.

CORRESPONDENCE.

HANGING OR ELECTRICITY.

To the Editor of the Central Law Journal:

There is in the issue of the JOURNAL of February 14, an article, or more specifically a diatribe, by R. S. Morrison, of Denver, hurled against execution by electricity. The writer of the article finds that the constitution of the State of New York contains a prohibition against the infliction of unusual and cruel punishment, and that notwithstanding this constitutional right of criminals to die in a pleasant way, the legislature, undoubtedly, in Mr. Morrison's estimation, a barbarous, fiendish set of men, has enacted that execution henceforth shall be by electricity instead of by hanging. The substance of the writer's charge is that this legislation is contrary to and in violation of the constitution of that State, in that execution by electricity is both unusual and cruel. He says, first, that such punishment is unusual because unprecedented. But if we are to believe that the framers of the constitution of the State spoken of meant deliberately to enjoin any change in the method of punishment, which had theretofore been common and accepted, except such change as should merely substitute an antiquated method for an antiquated method, we are to believe a very extraordinary thing. In this event, I say, we must impeach the wisdom, the common sense and foresight of those constitution makers. We are to decide that with malice prepense they endeavored to dam up the waters of progress and restrain the efforts of men towards amelioration of their legal condition. Or we are to convict them of weak-mindedness and a fitness to don the cap and bells. But on the other hand we may still rest assured that these constitution framers were men of good capacity and judgment, if we interpret the word "unusual" to partake of the meaning of the connected word "cruel." That is to say, that no punishments shall be inflicted unusual in their cruelty. Who doubts that this is the meaning? Such a construction is very common, indeed in perhaps all languages, and certainly in the English language, two adjectives being employed, one strengthening the other, instead of an adjective and adverb. And it is not to be inferred for a moment that the framers of New York's constitution intended to prohibit punishments unusually humane, as it would be necessary to infer if Mr. Morrison's construction is to be adopted. If, then, we cannot object to a punishment, with regard to the constitution mentioned, because it happens to be an innovation, we can do so because of its cruelty; and Mr. Morrison is roundly indignant at the unmerciful, inherent brutality and cruelty of execution by electricity. He speaks of the place of such an execution as being a "slaughter-house" and the execution a "butchery;" and yet a few lines above these words he designates this manner of execution as "poetic and sentimental cruelty." If Mr. Morrison thinks there is any similarity between the slaughtering of animals and poesy we should be pleased to peruse his evidences of the same.

Perhaps the mode of execution most resembling that by electricity is death by shooting. Where are the assailants of this method? But does anyone think the passage of a musket ball to be more painless and rapid than that of the electric spark?

And finally, what is the method with which Mr. Morrison is, by his eloquence against that which would displace it, so enthusiastically pleased? Why hanging, choking, asphyxiation, strangling—a struggling, gasping, twitching death. He desires to stand at the foot of that infernal machine—the gallows—inferior even to the guillotine as a product of civilization, and see a knotted, hard rope wound about a fellow-man's neck; to see that man jerked from his feet into the air, suffocating, gagging, clutchering and quivering; suffering torments indescribable and unknown, fuller in other words, for the delectation of Mr. Morrison, a human creature, the image of God, killed as we kill a chicken. This is indeed brutal, this is indeed inexorably cruel, and when this method of death is set against and opposed to that which the legislature of New York has sanctioned, then in truth do the words of Mr. Morrison become applicable, and if the words poesy and sentiment have a meaning which is congenial to the finer and more cultured faculties of the human being, then is death by electricity poetic and sentimental.

Chicago, Ill. F. R. BROOKS.

JETSAM AND FLOTSAM.

THE OHIO REPLEVIN LAWS.—At a meeting of the Cincinnati Bar Association in their rooms Tuesday evening last a report was received from a committee, appointed some time ago, consisting of Charles B. Wilby, Judson Harmon and John W. Warrington, suggesting modifications to the present Ohio replevin laws.

The changes go to the following objectionable features of the replevin laws as they now stand:

To prevent appraisements of property much below its real value, in order to bring it within the jurisdiction of a magistrate.

To prevent the giving of straw bonds, by providing that only freeholders shall be accepted as bondsmen.

To provide for reasonable time for giving notice by the defendant that the property is an heirloom.

To provide for the return of the property to the defendant upon his executing a proper undertaking—that is, placing him on the same basis as the plaintiff, subject to the same liability, if he is found not to be the owner.

In the discussion of the report of the committee a spirited debate arose upon a provision, which the meeting afterwards struck out, that in the event of the defendant becoming liable for breach of his undertaking, the liability shall be "for double the value of plaintiff's interest therein, with damages for its detention in all cases where it shall be found that the defendant willfully or negligently failed or refused to obey such order"—that is, the final order of court. The opposition to this provision was led by Mr. G. H. Wald, who doubted the constitutionality as well as the desirability of a punitive feature of the character.—*Weekly Law Bulletin.*

RECENT PUBLICATIONS.

THE AMERICAN PROBATE REPORTS. Containing Recent Cases of general value decided in the Courts of the several States on points of Probate Law With Notes and References. By Charles Fisk Beach, Jr., of the New York Bar. Author of "A Manual of the Law of Wills." Volume VI. New York: Baker, Voorhis & Co., Law Publishers, 66 Nassau Street. 1890.

Volume 6 of this series of excellent reports contains about one hundred cases in full, selected from the important decisions of the courts of the several States on probate matters. These cases, together with the valuable notes and references, by William W. Ladd, Jr., Esq., and Mr. Charles F. Beach, Jr., of the New York bar, make these reports most valuable to the practicioner and the judges in surrogate and probate courts.

BOOKS RECEIVED.

ADDRESS ON THE CIVIL SABBATH, from a Patriotic and Humanitarian Standpoint. By Wilbur F. Crafts. Authors' Publishing Co., New York.

WITH GAUGE & SWALLOW, ATTORNEYS. By Albion W. Tourgee. J. B. Lippincott Co., Philadelphia. 1889.

THE AMERICAN BAR ASSOCIATION, Supplement to the Report of the Twelfth Annual Meeting, containing an Account of the Hospitalities received by the Association at Chicago in August, 1889.

QUERIES.

[*Subscribers are invited to send short answers to the following.*]

QUERY NO. 11.

A, a contractor, entered into a contract with a church in the State of Washington to manufacture seats for the church building. B furnished the material, made the pew ends, etc., at his factory, and delivered the material to A at the church, where the seats were made specially for the audience room of the church, but are not permanently fastened to the floor. A failed to pay B for the material. Can B collect from the church under mechanic's lien on the church property? B.

QUERY NO. 12.

Is it negligence as a matter of law for a railroad company to retain in its services a careless engineer after notice of his unfitness? The Supreme Court of Indiana, in a recent case (L. S. & M. S. Ry. Co. v. Stupak, 23 N. E. Rep. 246); decided that it was not; that the company had a reasonable time after knowledge of the unfitness of the engineer in which to investigate his conduct, during which time it might retain him in its service without responsibility for his negligent acts. Is this decision in harmony with the decisions of other States upon this question? S.

QUERIES ANSWERED.

QUERY NO. 7.

[*To be found in Vol. 30, Cent. L. J. p. 102.*]

B cannot maintain an action against the railway for the claim of A against the railway, for damages is a chose in action, which does not pass to B by deed, unless expressly so stipulated: 15 N. E. Rep. 451. Therefore, B, in order to recover, must procure an assignment of the claim from A: 17 N. E. Rep. 171. W.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ACCEPTANCE—Sale.—Where after the seller has accepted a written order from the buyer for goods to be shipped on a certain day, the latter notifies him not to ship them, and refuses to accept them from the carrier when they are shipped, an action will not lie for the price of the goods, but for the damages for the refusal to accept them.—*Unexcelled Fire-Works Co. v. Polites*, Penn., 18 Atl. Rep. 1058.

2. ACCORD AND SATISFACTION.—Defendant, in an action for breach of marriage promise, may show that the cause of action was included in a settlement of a prosecution for fornication with defendant, committed on the same day that the promise was alleged to have been made.—*Dierstein v. Schubkagel*, Penn., 18 Atl. Rep. 1059.

3. ADMINISTRATION—Action by Heir.—The sole heir of a decedent, upon whose estate administration has ceased by the death of the administrator, and no effort has been made by the creditors, if there are any, to renew it, may maintain an action to enforce a vendor's lien existing on land of the estate sold by the administrator under order of court.—*Sanders v. Moore*, Ark., 12 S. W. Rep. 783.

4. APPEAL—Bond.—In appealing from the judgment of a justice of the peace in an action to recover the possession of a mining claim under the Code, an undertaking given in accordance with section 2182 thereof is sufficient, not only for a stay of proceedings on the judgment, but on an appeal as well.—*Bilyeu v. Smith*, Oreg., 22 Pac. Rep. 1073.

5. ASSIGNMENT FOR BENEFIT OF CREDITORS.—In Texas an assignment for benefit of creditors may be made by an agent or attorney in fact authorized thereto.—*Gouldy v. Metcalf*, Tex., 12 S. W. Rep. 880.

6. ATTACHMENT—Affidavit.—An affidavit made under Pub. St. R. I. ch. 206, § 12, which provides for the issue of a writ of attachment upon filing of an affidavit stating that plaintiff has a just claim against defendant, which is due, and setting forth some one of the specified grounds for an attachment, is not conclusive of the plaintiff's right to begin an action by attachment.—*Kelley v. Force*, R. I., 18 Atl. Rep. 1037.

7. BANKS AND BANKING—Set-off.—A bank, when sued

by the administrator of a deceased depositor for the amount of his deposit, may set-off the amount of a note of the intestate held by it which was due at the time of his death.—*Traders' Nat. Bank v. Cresson*, Tex., 12 S. W. Rep. 819.

8. BANKS AND BANKING—Equity.—A bank president is not such a trustee of the bank's funds as to give equity jurisdiction of a suit against him for misappropriation thereof.—*Appeal of McMullin*, Penn., 18 Atl. Rep. 1056.

9. BANKS AND BANKING—Liquidation.—The officers of a national bank, which has gone into liquidation, having no authority to bind the stockholders by the transaction of any business except that necessarily involved in the winding up of its affairs, an agreement by the president of such bank that its guaranty, made before liquidation, of certain notes, shall not be discharged by a change in the security of such notes and the release of the principal debtor, creates no liability on the part of the stockholders.— *Schrader v. Manufacturers' Nat. Bank*, U. S. S. C., 10 S. C. Rep. 238.

10. BANKRUPTCY.—An action by the assignee of a deceased bankrupt against the bankrupt's administrator to recover the proceeds of insurance policies on the bankrupt's life, which the bankrupt had assigned to defendent in trust for his daughters, is an action between "an assignee in bankruptcy and a person claiming an adverse interest," within the meaning of Rev. St. U. S. § 5057, requiring such actions to be brought within two years from the time the cause accrued, as the administrator represents the daughter's interests.— *Avery v. Cleary*, U. S. S. C. 10 S. C. Rep. 220.

11. CARRIERS— Limiting Liability.—A carrier cannot limit its liability for the full value of stock lost, through its negligence, by a contract to pay "the actual cash value at the time and place of shipment, but in no case exceed one hundred dollars per head," in case of total loss of said stock.—*Southern Pac. Ry. Co. v. Maddox*, Tex., 12 S. W. Rep. 815.

12. CARRIERS—Passengers.— A passenger on a grip-car pulled the rope for a stop at a crossing, but the signal, being out of order, gave no sound; and, while the car was in full motion, without signaling the conductor or gripman, who was near him, he stepped out of a side door, which was open and unguarded, and was struck immediately by a car passing on another track: *Held*, that he was guilty of contributory negligence.—*Weber v. Kansas City Cable Ry. Co.*, Mo., 12 S. W. Rep. 804.

13. CARRIERS — Unreasonable Charges. — An action against a railroad company to recover the excess of charges required to be paid by plaintiff over those required of other persons for the same service, brought more than five years after the cause of action accrued, its existence being fraudulently concealed by defendant, is not within Code Iowa, § 2530, being an action at law.—*Carrier v. Chicago, R. I. & P. Ry. Co.*, Iowa, 44 N. W. Rep. 203.

14. CHATTEL MORTGAGES — Description. — A chattel mortgage describing the mortgage property, as "my entire crops of cotton and corn to be raised by me the present year, or contracted by me," is not void for insufficient description.—*Henderson v. Gates*, Ark., 12 S. W. Rep. 780.

15. CHATTEL MORTGAGES—Foreclosure.—Gen. St. Conn. § 3010, providing that "the foreclosure of a mortgage shall be a bar to any further action upon the mortgage debt, note, or obligation, unless the person or persons who are liable for the payment thereof are made parties to such foreclosure," applies to a mortgage of personality as well as of realty, and to foreclosures by judicial sale as well as to strict foreclosures.—*Appeal of Ansonia Nat. Bank*, Conn., 18 Atl. Rep. 1030.

16. CHATTEL MORTGAGES.—If a mortgagee takes possession of the mortgaged chattels before any other right or lien attaches, his title is good against everbody, if the mortgage was previously valid between the parties, although it be not acknowledged and recorded.—*Garner v. Wright*, Ark., 12 S. W. Rep. 785.

17. CONSTITUTIONAL LAW—Pardon.—A pardon, granted by the governor to a convict on condition that he leave the State within forty-eight hours, never to return, is authorized by Const. S. C. art. 3, § 11, which provides that the governor may grant pardons after conviction, except in cases of impeachment, "in such manner, on such terms, and under such restrictions as he shall think proper."— *State v. Barnes*, S. Car., 10 S. E. Rep. 611.

18. CONSTITUTIONAL LAW — Punishments. — Act Ky. April 10, 1878, providing that, where a fine imposed in a misdemeanor case is unpaid, defendant may be required by the verdict to be put at hard labor for a certain time, is not unconstitutional, or discriminating between the rich and poor.—*Commonwealth v. Sherley*, Ky., 12 S. W. Rep. 771.

19. CONTRACTS — Construction. — Where, from shafts already sunk, it was known that there was in a tract of land a deposit of iron ore difficult to work and of inferior quality, an agreement to give one a deed of an interest "as soon as he may have successfully developed a deposit of iron ore of sufficient value to warranty further development," does not entitle him to a deed on the development in another spot of a deposit of the same vein, quantity, and quality.—*Whitehead v. Begley*, Mo., 12 S. W. Rep. 804.

20. CORPORATIONS—Right to Hold Land.—As no general statute of Wisconsin authorizes corporations to hold lands without regard to their uses, a railroad company incorporated by Laws Wis. April 12, 1866, ch. 540, authorizing it to acquire lands for railroad purposes, and 100 feet in width for right of way, and the land necessary for depots and other railroad buildings, and for purposes connected with the use of the road, cannot maintain an action to recover lands granted to it, where they are to be used for purposes not specified in the act of incorporation.—*Case v. Kelly*, U. S. S. C., 10 S. C. Rep. 216.

21. CONVERSION—Evidence.—In an action for the value of ores alleged to have been taken by defendants from plaintiffs' mine and converted to their own use, where the taking is admitted, as testimony by one of the plaintiffs as to a conversation held by him with defendants before commencement of the action, wherein defendants admitted the conversion, is pertinent as to damages, it cannot be excluded on an objection which states no grounds therefor, and such grounds cannot be stated for the first time after trial.—*Patrick v. Graham*, U. S. S. C., 10 S. C. Rep. 194.

22. CORPORATIONS—Dissolution.—Where a corporation exists by law, after the expiration of its charter, solely for the purpose of winding up its affairs, a majority in interest of its stockholders cannot sell its property to a new corporation, of which they are directors and stockholders, at a valuation estimated by themselves, against the will of the minority, and compel such dissenting stockholders either to receive shares of stock in the new corporation in return for their old shares, or be paid therefor on a basis of the estimated valuation of the property, and the minority may have the property publicly sold.—*Mason v. Pewabic Min. Co.* U. S. S. C., 10 S. C. Rep. 224.

23. CRIMINAL PRACTICE—Instruction. — Under Comp. St. Mont. 3d Div. § 485, providing that "the court shall decide all matters of law which may arise during the trial, but shall not charge the jury as to questions of fact," it is error to charge, in a prosecution for robbery, that the possession of goods recently stolen, "when unexplained, or not satisfactorily accounted for, by a defendant, tends strongly to establish the guilt of a defendant found in possession of the goods."— *State v. Sullivan*, Mont., 22 Pac. Rep. 1089.

24. CRIMINAL LAW— Self defense. — A person wrongfully assailed is not obliged to retreat, but may defend himself, opposing force to force,—using so much force as is necessary for his protection,— and can be held to answer only for exceeding such degree. — *State v. Sherman*, R. I., 18 Atl. Rep. 1040.

25. CRIMINAL PRACTICE — Confessions. — Instead of charging the jury, in general terms, that confessions

are to be received with greatest caution, the court, after charging the jury properly as to their right to reject the confession entirely if not free and voluntary, may restrict the charge touching caution to dealing with it after ascertaining it to be in evidence, that is, after finding it to be free and voluntary. — *Carr v. State*, Ga., 10 S. E. Rep. 626.

26. CRIMINAL PRACTICE — Homicide. — An indictment charging that defendant with a certain knife did stab, etc., in and upon the left side of the body of deceased one mortal wound, omitting before "one mortal wound" the expression "giving him then and there," etc., is sufficient after verdict. — *State v. Burns*, Mo., 12 S. W. Rep. 801.

27. CRIMINAL PRACTICE — Costs. — Where defendants have been convicted of carrying on a lottery, which offense, under Code Ala. § 4068, is punishable by fine without imprisonment, and have paid the fine imposed, but refused to pay the costs, payment of the same may be enforced by sentence to hard labor, under the above sections.—*Ex parte Joice*, Ala., 7 South. Rep. 23.

28. DAMAGES—Sale—Acceptance. — In an action for a refusal to accept corn delivered under a contract of purchase, an answer, admitting the contract and refusal, but alleging the failure of the seller to deliver corn of the quality agreed on, and demanding, by way of counterclaim, the amount of profits which the purchaser would have realized on a resale that he had made, is bad on demurrer, which fails to allege that the purchase and sale were made by the parties in contemplation of a then existing contract of resale to certain named parties in a designated market and at a specified price, and that at the time and place of delivery under the contract of purchase no other corn of the desired quality could be obtained with which to fulfill the contract of resale.—*Rahm v. Deig*, Ind., 23 N. E. Rep. 141.

29. DEATH BY WRONGFUL ACT — Parties. — A married woman, in an action for damages for negligence in causing the death of her son, who had for many years supported her, alleged that her husband had abandoned her, and for many years contributed nothing to her support; that her son had supported her, but had never given anything towards the support of his father; and asked to be permitted to prosecute the action in her own name, and for her own benefit; but, if it should be held that her husband was entitled to any benefit, that she might be permitted to prosecute the action in her own name for the benefit of both: *Held*, that under Rev. St. Tex. arts. 2903, 2904, giving a right of action, for death caused by negligence, for the benefit of the surviving wife, child, or parents, and authorizing suit by all, plaintiff was entitled to maintain the action without joining her husband. — *Missouri Pac. Ry. Co. v. Henry*, Tex., 12 S. W. Rep. 828.

30. DEEDS—Undue Influence.—A deed, executed by an aged parent in favor of two of his daughters and a grandson, will not be set aside at the instance of the other children of the grantor, on the ground that he was controlled by the improper influence of one of the daughters, his favorite child, where the facts indicate that his will power was equal to that of such daughter, and that he resisted the influence attempted to be exercised by his son, when the latter told him that the will ought not to be made. — *Sullivan v. Hodgkin*, Ky., 12 S. W. Rep. 773.

31. DESCENT AND DISTRIBUTION.—Defendant conveyed his interest in his father's estate to his mother, and afterwards a decree was entered in the probate court distributing the land belonging to the estate among the heirs at law, including defendant: *Held*, that the decree of distribution did not invalidate defendant's deed, under Code Civil Proc. Cal. § 1666, which provides that a decree of distribution is conclusive as to the rights of the heirs, legatees, or devisees. — *Chever v. Ching Hong Poy*, Cal., 22 Pac. Rep. 1081.

32. EJECTMENT — Judgment — Trespass to try Title.— Where, by agreement, two methods of locating a survey are presented to the jury, with instructions to find for the plaintiff or defendant, according to the reliability of the method contended for by each, and the verdict is in favor of locating the survey as plaintiff claims, and the court awards judgment thereon, the judgment will not be disturbed, unless defendant's method of locating the survey is certainly the most accurate.—*McFarlin v. Vaughn*, Tex., 12 S. W. Rep. 813.

33. EJECTMENT. — In an action of trespass to try title to land, it devolves on the plaintiff to show title in himself, and, until he makes a *prima facie* case, the defendant is not required to offer any evidence at all. — *Brown v. Roberts*, Tex., 12 S. W. Rep. 807.

34. EMINENT DOMAIN—Highways.— Upon an appeal to the circuit court from an assessment of damages for opening a county road across the lands of the plaintiff, the question to be tried and determined is, how much less valuable the lands will be rendered thereby.—*Beekman v. Jackson County*, Oreg., 22 Pac. Rep. 1074.

35. EQUITY—Fraud.—There may often be a remedy, at law, for fraud, but where it is desirable to remove a cloud from the title to real estate by decreeing a cancellation of a fraudulent conveyance, that remedy, being more complete, courts of equity will take jurisdiction, and grant appropriate relief. — *Teall v. Slaven*, U. S. C. C., (Cal.), 40 Fed. Rep. 774.

36. EXECUTORS AND ADMINISTRATORS. — Where a note is made payable to "A, executor of B, or bearer," it will be presumed that A held it in his representative capacity, and on his death the administrator *de bonis non* of B is the proper party to sue on the note, and not the administrator of A.— *Ballinger v. Cureton*, N. Car., 10 S. E. Rep. 664.

37. FALSE REPRESENTATIONS — Evidence. — In trover for property alleged to have been procured by defendant through false representations as to his financial ability, and without ever intending to pay for it, defendant may, for the purpose of showing that the plaintiff did not rely upon the representations, show that during the three years next preceding the date in question he had several times obtained credit at the plaintiff's store, and had on one occasion borrowed $25, and on another $50, of the plaintiff, without giving him security; and that these sums had all been paid. — *Stearn v. Clifford*, Vt., 18 Atl. Rep. 1045.

38. FEDERAL COURTS—Fees.—Under Rev. St. U. S. § 824, providing that when an indictment is tried, and conviction is had, "the district attorney may be allowed, in addition to the attorney's fees herein provided, a counsel fee, in proportion to the importance and difficulty of the cause, not exceeding thirty dollars," the amount of such fee, within the prescribed limit, is within the discretion of the trial court, and its allowance is not subject to reduction by the attorney general, though Rev. St. U. S. § 368, provides that "the attorney general shall exercise general supervisory powers over the accounts of district attorneys.— *United States v. Waters*, U. S. S. C. 10 S. E. Rep. 249.

39. FRAUDULENT CONVEYANCES. — The answer alleged that the deed made by plaintiff's vendor was without consideration, and to hinder, delay and defraud one F, a creditor of vendor, which allegation was denied: *Held*, that no issue was raised as to whether the deed was made to delay or defraud the creditors of the vendor, generally.—*Traverso v. Tate*, Cal., 22 Pac. Rep. 1082.

40. FEDERAL COURTS.— Jury Commissioner. — 21 U. S. St. at Large, 43, requiring the court to appoint a jury commissioner, who shall be a citizen of good standing, and shall reside in the district in which the court is held, and who shall be a well-known member of the principal political party in the district opposing that to which the clerk belongs, is directory merely, and not mandatory. — *United States v. Chaires*, U. S. C. C. (Fla.), 40 Fed. Rep. 820.

41. FRAUDULENT CONVEYANCES. — In an action by a creditor to set aside, on the ground of fraud, a bill of sale executed by the debtor to a relative, an instruction to the jury that, if the consideration, or any part of it, alleged to have been paid by the vendee for the goods was unreal and fictitious, the transfer would be fraudu-

lent, was properly given.— *Brasher v. Jemison*, Tex., 12 S. W. Rep. 809.

42. HOMESTEAD—Judgment. — As the homestead of a judgment debtor is not subject to levy and sale under the judgment, no lien attaches to the land thereunder. —*Grimes v. Portman*, Mo., 12 S. W. Rep. 792.

43. HOMESTEAD—Power of Attorney.— In Texas the homestead of the husband and wife may be alienated under a power of attorney duly executed.— *Jones v. Robbins*, Tex., 12 S. W. Rep. 824.

44. HOMESTEAD. — Upon the facts, defendant could not, by dividing his business between the two buildings, hold them both as a business homestead.—*Pfeifer v. McNott*, Tex., 12 S. W. Rep. 821.

45. HUSBAND AND WIFE—Torts.—A suit for a tort, begun against a husband and wife, may proceed against the wife alone, if her husband dies during its pendency. —*Baker v. Braslin*, R. I., 18 Atl. Rep. 1039.

46. INJUNCTION—Bond.—Where an order is made that an injunction issue on the filing of a bond, and the bond recites it is given in consideration that the said writ of injunction may issue, but the injunction is issued and served before bond is given, the sureties on the bond are not liable.—*Carter v. Muirein*, 22 Pac. Rep. 1086.

47. JUDGMENT—Confession.— Mansf. Dig. Ark. § 5185 provides that any person indebted, or against whom a cause of action exists, may personally appear in a court of competent jurisdiction and confess judgment therefor: *Held*, that a judgment confessed before a justice, the record of which fails to show, except by inference, that defendant personally appeared, is void.—*Smith v. Finley*, Ark., 12 S. W. Rep. 782.

48. JUSTICE OF THE PEACE—Disqualifications.—A justice of the peace is not disqualified from presiding in a case where one of the parties married a cousin of the justice's wife, the party and the justice not being otherwise related.—*Blalock v. Waldrup*, Ga., 10 S. E. Rep. 622.

49. LANDLORD AND TENANT—Assignment.—Under Rev. St. Mo. 1889, § 6358, providing that no tenant for a term not exceeding two years shall assign or transfer his term or interest, or any part thereof, to another without the written consent of the landlord, such interest cannot be passed by sale under legal process.—*Holliday v. Aehle*, Mo., 12 S. W. Rep. 797.

50. LEASES—Covenants.—A lease, containing a covenant that, under penalty of forfeiture, the demised premises shall not be occupied otherwise than as a saloon and dwelling without the lessor's written consent, is not terminated by the lessee's failure to obtain a license to sell intoxicating liquors. —*Boyle v. Teller*, Penn., 18 Atl. Rep. 1069.

51. LIBEL — Actionable Words. — To recover special damages for the utterance of words not actionable *per se*, such words need not, of themselves, convey the meaning of injurious imputation, but it is sufficient if they were intended to, and did in fact, convey such imputation, and reasonably had some connection with the damages claimed to have been caused by them.—*Hardin v. Harshfield*, Ky., 12 S. W. Rep. 779.

52. LIEN—Insolvency.—Where one has a lien on property for securing the payment of a debt against an insolvent debtor, he may retain the property, if the assignee does not require it to be sold, and enforce his lien.—*Rogers v. Heath's Adm'r.*, Vt., 18 Atl. Rep. 1043.

53. MALPRACTICE— Partnership. —Where, pending an action against two physicians as partners for maltreatment of a dislocated shoulder, one of the partners dies, the action may be abated as to him, and prosecuted as to final judgment against the survivor.—*Hess v. Lowery*, Ind., 23 N. E. Rep. 158.

54. MASTER AND SERVANT.— In an action by a servant against his master, for injuries caused by defective machinery, defendant is not bound to show that its condition was not, and could not, by the exercise of reasonable care, have been, known to defendant.—*Hudson v. Charleston, C. & C. R. Co.*, N. Car., 10 S. E. Rep. 669.

55. MASTER AND SERVANT— Wages — Garnishment. — Wages, as such, may be recovered in this State by a clerk or other employee wrongfully discharged before expiration of his term; the suit being brought after the term expired. Money thus recovered will be exempt from garnishment where wages earned by actual service would be so exempt.—*Cox v. Bearden*, Ga., 10 S. E. Rep. 627.

56. MASTER AND SERVANT— Assumption of Risk. — A workman employed to work a particular machine, which he fully understands, takes the risk of accidents that may happen to him while using it, so long as the machine is maintained in the same condition as by his contract he has a right to expect and to rely upon. The master is not liable for accidents merely because he has not adopted recent improvements that afford some addition protection.—*The Maharajah*, U. S. D. C. (N. Y.), 40 Fed. Rep. 784.

57. MARINE INSURANCE—Policy.—Upon a marine insurance policy issued to "A E, upon account of whom it may concern, in case of loss, to be paid to him or order," where the insurance was effected for the benefit of the libelant, the owner at the time: *Held*, that the suit was rightly brought in the name of the libelant, who was the insured under the policy.—*Earnmoor v. California Ins. Co.*, U. S. D. C. (N. Y.), 40 Fed. Rep. 847.

58. MASTER AND SERVANT—Negligence.—In an action to recover damages for negligence, the plaintiff must allege in his complaint the acts or omissions of the defendant upon which he bases his right to recovery, and show that they occurred through or by the negligence of the defendant. The plaintiff must state the facts constituting his cause of action. He cannot state one and prove another. Nor, if he states one, can he supply the defects in his complaint by evidence at the trial.— *Woodward v. Oregon Ry. & Nav. Co.*, Oreg., 22 Pac. Rep. 1077.

59. MINES AND MINING—Location.—It is requisite to a valid location and to the ownership of the title to a valid lode mining claim, that there should be a discovery of ore, gold are silver bearing mineral in rock place, showing a well defined crevice, a discovery at least ten feet deep from the lowest rim rock thereof, which discovery of mineral must be at the point claimed and designated, or made the point of discovery by the locators of said claim, and so designated in the location certificate relied upon by them in the making of said location.—*Cheesman v. Shreeve*, U. S. C. C. (Colo., 40 Fed. Rep. 787.

60. MISTAKE — Specific Performance. — Where a contract for the conveyance of land, with which both parties were familiar, mentions its natural boundaries, and states that it has a frontage along low-water mark of "138 feet, more or less," but neither of them knew or took the trouble to ascertain definitely what the length of line was, the vendee, on discovering that the frontage is only 123 feet, will not be allowed a proportionate reduction in the purchase price. — *Appeal of McCullough*, Penn., 18 Atl. Rep. 1060.

61. MORTGAGE—Recordation. — Where a mortgage is admitted to record on the affidavit of one of the witnesses thereto, stating only that he saw the mortgagor sign the instrument; that he himself signed it as a witness; and that he saw the other witness sign it, such probate being insufficient, the mortgage is not recorded within Code Ga. § 1957, declaring that mortgages not recorded within the time required by law are postponed to all other liens created prior to the actual record of the mortgage; and hence the lien of a judgment rendered since such improper record is prior to that of the mortgage.—*New England Mortgage Security Co. v. Ober*, Ga., 10 S. E. Rep. 625.

62. MORTGAGE—Foreclosure.—The regularity of a decree of foreclosure and sale cannot be questioned on an appeal taken from a personal decree rendered under the eighty-ninth equity rule for balance of amount reported by the master to be due on the former decree, over and above the proceeds of the sale of the mortgaged property.—*Lenfesty v. Coe*, Fla., 7 South. Rep. 2.

63. MORTGAGES—Foreclosure—Where there is no provison, either in a bond or in the mortgage by which it is secured, or elsewhere, that the bond shall become due, or may be declared due, on the happening of some event prior to the date of maturity, it is error for a court of equity to decree the unpaid balance of the bond to be due when in fact it has not matured, though the mortgaged property has been sold on foreclosure, and the proceeds applied to the payment of the interest and principal, on default of interest, as provided by the mortgage.—*Ohio Cent. R. Co. v. Central Trust Co.*, U. S. C., 10 S. C. Rep. 235.

64. MUNICIPAL CORPORATION — Defective Streets. — Where the charter imposes the duty upon a city to keep its streets and highways in repair, and it neglects to do so, and one is injured by reason thereof, it is liable for the damages suffered. — *Farquar v. City of Roseburg*, Oreg., 22 Pac. Rep. 1103.

65. MUNICIPAL CORPORATIONS—Bonds. — A municipal corporation is not bound to seek out the holders of its bonds, and tender them the amount thereof, on their maturity, in order to stop the running of interest.—*Friend v. City of Pittsburgh*, Penn., 18 Atl. Rep. 1060.

66. MUNICIPAL CORPORATION— Defective Sidewalks.—Where a property owner is bound to repair the sidewalk in front of his premises, both by ordinance and by his express promise, the principle that no contribution will be inforced between joint wrong doe does not apply todefeat the right of the borough to recover of him the amount of a judgment paid by the borough to one who was injured from defects in the sidewalk.—*Borough of Brookville v. Arthurs*, Penn., 18 Atl. Rep. 1076.

67. MUNICIPAL CORPORATIONS—Negligence.—In an action against a city for damages for personal injuries caused by the negligent construction of a set of public scales, owned and operated by the city, the petition must show that the city was a corporation and that it was within the scope of its powers to contract and maintain such scale.—*Mitchell v. City of Clinton*, 12 S. W. Rep. 793.

68. MUNICIPAL CORPORATION—Bonds.—A contract for the construction of a sewer in Kansas City provided that the contractor should be responsible for unlawful damages to persons or property from negligence or carelessness, and indemnify the city against all losses or claims for damage on account of such neglect or carelessness; and the sureties thereto agreed that he should well and faithfully perform all the terms of the contract: *Held*, that the charter of Kansas City (Acts Mo. 1875, art. 8, § 9) requires that such contracts shall contain a covenent for the payment of laborers, to be guarantied by the sureties, and gives laborers the right to an action thereon, the bond, apart from the covenant for the benefit of laborers was for the benefit of the city only, and an action against the sureties on their contract for damages for injuries sustained by the carelessness of the contractor or his employees cannot be maintained by a third person.—*Kansas City v. O'Connell*, Mo., 12 S. W. Rep. 791.

69. NEGLIGENCE—Railroad Companies.—In an action against a railroad company for the alleged negligent killing of a person, where it appears that deceased was killed while attempting, to drive over a public crossing on a dark and rainy night, by a collision of an engine and tender, running backward, evidence by one of plaintiffs' witness that he was present at the time of the accident, that no whistle was blown and no bell was rung, and that there was no light on the tender as it was approaching, is sufficient to take the case to the jury on the question of negligence.—*State v. Union R. Co.*, Md., 18 Atl. Rep. 1032.

70. NEGOTIABLE INSTRUMENTS—Lex Loci Contractus.—In an action in Kentucky on a note payable in another State, and negotiable under its laws, the law of the forum governing defenses between antecedent parties to negotiable instruments will be applied though the note is not negotiable under the Kentucky laws. Overruling Davis v. Morton, 5 Bush, 190.—*Stevens v. Gregg*, Ky., 12 S. W. Rep. 775.

71. NUISANCE—Abatement.—Where the evidence as to whether a dam which has been in use for its water-power for over 50 years, and around which a city has been gradually built up, is a nuisance, is conflicting, such dam cannot be abated by proceedings in equity until the right to abate it as a public nuisance has been first established in an action at law.—*Appeal of McClain*, Penn., 18 Atl. Rep. 1066.

72. OPINION EVIDENCE.— In the trial of an action against a physician and surgeon for alleged unskillfulness and negligence in the treatment of a special case of sickness or infirmity which he is employed to attend, a liability cannot be established against him in consequence of his failure to learn the peculiar condition of the patient in another respect, unless the evidence clearly shows that he does not possess such a reasonable degree of learning and skill as is requisite for the practice of his profession, or that he did not exercise his best judgment, and ordinary care and diligence, to discover whether such condition existed or not.—*Langford v. Jones*, Oreg., 22 Pac. Rep. 1064.

73. PARTNERSHIP— Survivors.— An action for a firm debt cannot be maintained against the estate of a deceased partner, in the absence of proof of a final settlement between the surviving partner and the estate, and that the partnership assets are insufficient to pay the debt.—*Beaton v. Wade*, Colo., 22 Pac. Rep. 1093.

74. PARTNERSHIP—Judgment.—In Louisiana, in a suit against a commercial partnership, where citation is issued, directed to and served on the firm, and an order is afterwards made for citation to issue to the individual partners, and an answer is filed by the defendants, a judgment may be rendered *in solido* against the individual partners.—*Mitchell & Rammelsburg Furniture Co. v. Sampson*, U. S. C. C. (Fla.), 40 Fed. Rep. 805.

75. PARTNERSHIP— Individual Liability.—In order to make the individual property of a partner liable to a judgment against the partnership, it must appear that the partner was served with process in the suit against the firm.—*Clayton v. Roberts*, Ga., 10 S. E. Rep. 621.

76. PHYSICIANS AND SURGEONS—License.—The practice of medicine by a medical graduate of another State, whose diploma is recorded, is not indictable, though he had no license or certificate of qualification from a board of medical examiners in the county, organized under or in affiliation with the State association. — *Brooks v. State*, Ala., 6 South. Rep. 902.

77. PLEADING—Equity.— To a bill to subject stocks of an estate to the payment of a debt for which they were held as collateral security, the answer by one of the executors admitted that the money was borrowed from plaintiff and the security given as alleged in the bill, but averred that the loan was made to the business firm of which the executor was a member, and that the stock pledged by the executor as security then belonged to the estate, and that these facts were known to plaintiff: *Held*, that the answer set up no new contract, but was responsive to the bill, and, unless it was overcome by proof, plaintiff could not recover.—*Bell v. Farmers' Dep. Nat. Bank*, Penn., 18 Atl. Rep. 1079.

78. PRINCIPAL AND SURETY — Insolvency. — A sole solvent surety on a note, the maker of which is insolvent, becomes liable thereon immediately on its maturity and non-payment, and is from that time in equity a matured creditor of the maker, though she does not then know of his insolvency, and, where the maker is shortly afterwards judicially declared an insolvent, his trustee takes the property subject to the surety's rights. —*Merwin v. Austin*, Conn., 18 Atl. Rep. 1029.

79. PUBLIC LANDS.— Where a party has fully complied with all of the requirements of the laws of the United States granting pre-emptions to the settlers upon the public lands, and has paid the purchase money for the land settled upon, made final proof, and received the receiver's certificate, such person may sell the lands thus acquired before the issuance of a patent, and the patent when issued inures to the benefit of his grantee. —*Hyde v. Holland*, Oreg., 22 Pac. Rep. 1104.

80. QUIETING TITLE — Ejectment. — Under the Iowa statute giving a person in possession of land the right to bring a bill in equity to quiet title, such a bill is not demurrable because it shows that defendants, who are non-residents of the State, have sued complainant in ejectment for the land, and that such ejectment suit is still pending.—*Langstraat v. Nelson*, U. S. C. C. (Iowa), 40 Fed. Rep. 783.

81. REHEARING.— By virture of its appellate jurisdiction, conferred on it by Const. Cal. art. 6, § 4, the supreme court has the inherent power, independent of legislative enactment, to grant a rehearing in cases on appeal until a *remittitur* is regularly issued; and as § 2, of the same article provides that a majority, consisting of four justices, may decide any matter within the jurisdiction of the court, Code Civil Proc. § 45, which provides that, where there has been no decision in one of the departments, an order granting a rehearing after a judgment in bank "shall be made in writing, signed by five justices," is unconstitutional.— *In re Jessup's Estate*, Cal., 22 Pac. Rep. 1028.

82. SUPREME COURT—Jurisdictional Amount. — In determining the right to appeal to the supreme court from a decretal order made on application of a receiver for final settlement, allowing certain sums to the receiver and his counsel as compensation for their services, these sums will be considered as items of the receiver's account, as the allowance of counsel fees is to the receiver, and not directly to the counsel.— *Stuart v. Boulware*, U. S. S. C., 10 S. C. Rep. 242.

83. SUPREME COURT—Federal Question.—The supreme court, having no jurisdiction to review a judgment of the highest court of a State, unless a federal question has been decided by that court against the plaintiff in error, cannot review a judgment of such court, where the only question decided was that a former judgment, rendered against the plaintiff in error and in favor of the grantor of defendants in error, was a bar to this action.—*City and County of San Francisco v. Itsell*, U. S. S. C., 10 S. C. Rep. 241.

84. TELEGRAPH COMPANIES — Taxation. — Telegraph companies which have accepted the provisions of Rev. St. U. S. §§ 5263-5268, in regard to the use of the public domain by telegraph companies, cannot be taxed by the State authorities on messages and receipts therefrom, between points within and points without the State, as this is interstate commerce, but may be so taxed on messeges carried wholly within the State. — *Western Union Tel. Co. v. Seay*, U. S. S. C., 10 S. C. Rep. 161.

85. TRIAL—Criminal Practice.— Where a trial is commenced within sixty days after information is filed, but after the evidence is in, a juror becomes disabled from attending court and the jury is discharged, defendant has been brought to trial within Pen. Code Cal. § 1382, providing that the court must order the prosecution to be dismissed unless defendant is brought to trial within sixty days after the filing of the information. — *Ex parte Ross*, Cal., 22 Pac. Rep. 1086.

86. TRUSTEES—Investments.—Investments by trustees upon mere personal security are not regarded by the courts as safe, prudent, or proper; consequently, if they be made, they are at the risk of the trustees, who must personally answer for any loss that may result from them.—*Dufford v. Smith*, N. J., 18 Atl. Rep. 1052.

87. WATER COURSES— Limitation of Action.—The limitation of two years prescribed by § 14, ch. 66, Comp. Laws 1885, applies to damages occasioned by the erection of mill-dams, although such dams are not constructed under the terms or provisions of said chapter 66.—*Hardesty v. Ball*, Kan., 22 Pac. Rep. 1095.

88. WATER COURSES—Trespass. — Defendant's vendor changed the grade of the street in front of his property, and thereby turned the course of a small brook, which had previously run across the street, over his property, and into a larger stream. By such change the brook was made to run into an old mill-race, which passed plaintiffs' property, and from this race the water, by percolation, found its way into plaintiffs' cellars: *Held*, that as plaintiffs' property was not located on or near the brook, they had no such interest in the watercourse as could give them as easement as riparian owners.—*Jones v. Westerhausen*, Penn., 18 Atl. Rep. 1072.

89. WILLS—Parties.—A decree annulling a will in proceedings for that purpose, to which the executor, the devisee of a precedent particular estate, and the devisee of the remainder in fee-simple, are made parties, is conclusive as against devisees of a contingent interest, by way of executory devise, though they are not made parties, as the persons mentioned are all the necessary parties.—*Miller v. Texas, etc. Ry. Co.*, U. S. S. C., 10 S. C. Rep. 206.

90. WILL—Probate.—In a proceeding to probate a will it was stipulated by the parties that, according to the finding of the issues by the jury, the form of their verdict should be: "We, the jury, find for the contestant, K," or "for the petitioner, P." The stipulation was not in writing, nor was it entered on the minutes, nor were special findings waived in any other manner. The verdict was for contestant, and an entry thereof was made in the minutes, in the presence of the petitioner and his counsel, without any objection thereto: *Held*, that the absence of any findings of fact was an irregularity which, as it did not affect the substantial rights of the parties, could be disregarded, within Code Civil Proc. Cal. § 475.—*King v. Ponton*, Cal., 22 Pac. Rep. 1087.

91. WITNESS — Transactions with Decedent.— In an action on a joint note against the surviving maker and the executors of the deceased maker, the surviving maker, having an interest in rendering his co-defendant liable as well as himself, is as to tranactions that occurred between himself and such deceased maker, tending to show the latter's liability, an incompetent witness; Code Civil Proc. N. Y. § 829, providing that a person interested in the event of a suit cannot be examined as a witness in his own behalf or interest against the executor of a deceased person, in regard to transactions between himself and such decedent.— *Wilcox v. Corwin*, N. Y., 23 N. E. Rep. 165.

92. WITNESS—Federal Courts .— As Rev. St. U. S. § 914, providing that the practice, etc., in federal courts shall conform as near as may be to that in State courts in like causes, expressly excepts equity causes, where plaintiffs read in evidence, in a suit in equity in the federal courts, depositions of defendants, they make defendants their own witnesses, and cannot contend that they are unworthy of credit, though the depositions were taken "as under cross-examination," under a State statute (1 Bright. Purd. Dig. Pa. 728) providing that a party to any civil proceeding may be examined "as if under cross-examination," at the instance of the adverse party, "but the party calling for such examination shall not be concluded thereby."—*Dravo v. Fabel*, U. S. S. C., 10 S. C. Rep. 170.

93. WITNESS— Transactions with Decedents. — Under Code Ga. § 3854, providing that where one party to the contract or cause of action is dead the other shall not be a witness, a surety to whom an execution against his principal was assigned on payment of the debt cannot testify that the conveyance to him of the land, on the purchase of which the debt arose, was not to be in satisfaction of his claim, where his principal is dead, and the other parties to the action are administrators of execution creditors of his deceased principal. — *Nesbitt v. Parrott*, Ga., 10 S. E. Rep. 589.